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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1992

COOL LIGHT COMPANY, INC.,
PETITIONER,

v.

GTE PRODUCTS CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment requires a trial judge to enter judgment on a jury's verdicts if a plausible view of the case resolves perceived anomalies or inconsistencies in the jury's fact-finding or verdicts.

2. Whether the Seventh Amendment requires the parties or the trial court to raise questions concerning perceived anomalies or inconsistencies in the jury's fact-finding or verdicts while the jury is still impanelled and available for inquiry.

3. Whether the Seventh Amendment requires that discrete and untainted portions of a jury's verdict be respected even if other aspects of the verdict are set aside.

4. Whether the Seventh Amendment requires a trial judge who elects to set aside a verdict under Rules 49 or 59 to specify the rule relied on and to articulate a precise basis for that decision.

5. Whether the Seventh Amendment requires a trial judge who elects to set aside a verdict as against the weight of the evidence under Rule 59 to demonstrate that the verdict, if left to stand, would constitute a grave injustice.

6. Whether the Seventh Amendment requires appellate courts to conduct a plenary review of a trial court's decision to set aside a jury verdict under Rule 49 or 59.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Cool Light Company, Inc. ("Cool Light"),[1] respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

OPINIONS BELOW

The opinion of the First Circuit below is reported at *Cool Light Co., Inc.* v. *GTE Products Corporation*, 973 F.2d 31 (1st Cir. 1992), and is set forth in the Appendix at A-1. The

[1] The petitioner, Cool Light Company, Inc. ("Cool Light"), is the wholly-owned subsidiary of a holding company, Panagiotou Industries, Inc.; this disclosure is made in compliance with Rule 29.1 of the Rules of this Court.

order of the First Circuit below denying rehearing and rehearing en banc is unreported. It is set forth in the Appendix at A-30 and A-31. The jury's answers to special interrogatories and verdicts are unreported. They were issued on June 29, 1990 and are set forth in the Appendix at A-11 through A-20. The memorandum opinion of the District Court (McNaught, J.) setting aside the jury verdict for plaintiff-petitioner is unreported. It was issued on August 9, 1990 and is set forth in the Appendix at A-21 through A-24. The decision of the District Court denying the motion of the plaintiff-petitioner for reconsideration, or in the alternative, for reduction in the amount of compensatory damages, is unreported. It was issued on August 29, 1990 and is set forth in the Appendix at A-25 and A-26. The opinion of the First Circuit denying a writ of mandamus directed to Judge McNaught is unreported. It was issued on October 22, 1990 and is set forth in the Appendix at A-70 and A-71. The opinion and final judgment of the District Court (Keeton, J.) dismissing plaintiff's claims after retrial is unreported. It was issued on December 11, 1991 and is set forth in the Appendix at A-68 through A-69.[2]

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on August 21, 1992. A timely petition for rehearing and rehearing en banc was filed on September 4, 1992 and denied on October 15, 1992. This petition is filed within 90 days of the denial of the timely petition for rehearing and rehearing en banc. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[2] At issue in this petition is the propriety of the order of the District Court (McNaught, J.) granting a new trial, and not the result of the jury-waived retrial of a portion of the case by the District Court (Keeton, J.). The opinion of Keeton, J. is included in the Appendix only for the Court's convenience; the opinion of the Court of Appeals makes several references to it.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 49 of the Federal Rules of Civil Procedure is set forth in the Appendix at A-72, 73.

Rule 59 of the Federal Rules of Civil Procedure is set forth in the Appendix at A-73, 74.

STATEMENT OF THE CASE

The United States District Court for the District of Massachusetts had original jurisdiction of the action below pursuant to 28 U.S.C. § 1332(a)(1). The diversity action was brought by Cool Light, a small company which had developed a series of innovative, heat-free lighting products for use in the motion picture and television industry. The defendant, GTE Products Corporation ("GTE"), was accused of lying about its ability to manufacture and supply quantities of reflectors—a critical component in Cool Light's products—and of a deliberate failure to supply such components under several written purchase orders which it had accepted. Cool Light was eventually forced out of business; GTE then introduced a competitive lighting product of its own.

On June 29, 1990, after 24 days of trial and 2 days of deliberation, a unanimous, ten-person jury found GTE liable to Cool Light on three counts: fraud, breach of contract and breach of the implied obligation of good faith and fair dealing. (A-32 through A-49). The jury provided written

answers to 17 special interrogatories given them by the trial judge pursuant to Fed. R. Civ. P. 49(b) (A-11 through A-13), and returned general verdicts, on three of which liability was found, and on a counterclaim, on which liability was rejected. (A-14 through A-20).

Of the 17 special interrogatories and responses by the jury, the following are salient:

11. Did anyone at GTE make a false representation to Mr. Panagiotou[3]?

    Yes.

12. If your answer to Question #11 is "Yes", what was that representation?

    That GTE had the ability to produce, in volume, a quality product of dichroic coated reflectors per the specifications disclosed by Cool Light Inc.

13. If you find that GTE made a false representation, did Mr. Panagiotou rely on it to his damage?

    Yes.

14. If Cool Light lost potential profits as a result of GTE's conduct, what was the amount of lost profits?

    Nine Million Three Hundred Thousand Dollars ($9,300,000.00).

15. Was there an agreement made by GTE with Cool Light?

    Yes.

16. If your answer to Question #16 is "Yes", was the agreement

    In writing? Yes.
    Oral? Yes.

[3] George Panagiotou was the founder and principal of Cool Light.

In its verdict on the fraud count, the jury awarded damages in the amount of $9,450,000.00. (A-17). In response to an oral query by the trial judge, the jury briefly retired, and returned with the elaboration that $6,500,000.00 of this sum was for punitive damages and $2,950,000.00 represented compensatory damages. (A-37 through A-39).[4] On the contract count, the jury awarded $3,694,000.00 (A-18), and on the good faith and fair dealing count, $2,800,000.00. (A-19).

Cool Light was thus awarded $9,444,000.00 in compensatory damages, and $6,500,000.00 in punitive damages, a total of $15,944,000.00.

On each of the three counts upon which the jury found the respondent liable, the trial judge had given the jury explicit instructions which included, but extended beyond, lost profits:

Fraud

"If . . . you find fraud . . . Mr. Panagiotou is entitled to . . . lost profits and out-of-pocket expenses . . . ."[5]

Contract

"If . . . you are persuaded that there was a breach of contract . . . Mr. Panagiotou . . . would be entitled to those damages which would put him in a position that he would be in if the contract had been fulfilled. Only those foreseeable damages could be awarded by a jury . . . ."[6]

Good Faith

"If you should find an evasion of good faith . . . then . . . damages would constitute the loss of net profits."[7]

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[4] The jury had been instructed by the trial judge that under the applicable law of California, punitive damages could be awarded on the fraud count.

[5] Vol. 24, page 31. Citations are to the record of proceedings before the trial court.

[6] Vol. 24, page 34.

[7] Vol. 24, page 36.

Prior to the discharge of the jury, neither the judge nor the respondent raised any question concerning the consistency of the jury's response to special interrogatory 14 with these verdicts, or the consistency of these verdicts with each other. Rule 49 questions were first raised by the trial judge, *sua sponte*, in a hearing on August 2, 1990. On August 9, 1990, the trial judge threw out the work of the jury in its entirety, and ordered a new trial on all the jury-tried counts. (A-21 through A-24). His articulated concerns were that a) the jury, in its response to interrogatory 14, indicated that the total amount of profits lost by the petitioner as a result of the respondent's conduct was $9,300,000.00, but in its general verdicts the jury awarded a total of $9,444,000.00 in compensatory damages (A-22); b) having found a total of $9,300,000.00 in lost profits, the jury did not include an assessment of that full amount in each of the three general verdicts, but allocated smaller amounts to each (A-22); and c) the smaller sums were not equal to each other, and thus were arrived at by some method other than simply dividing the lost profits into thirds and adding other expenses such as out-of-pocket expenses. (A-22, A-23). He offered no other grounds for his order of August 9. (A-24).

It bears emphasis that, apart from his concern over the calculation and apportionment of compensatory damages, Judge McNaught never ruled on any other ground, and gave no reasons that could support a ruling on any other ground.[8] Critically, no question about the weight of the evidence justifying the jury's liability and punitive damage findings was raised. Rule 59 was simply never mentioned. Moreover, no question about the jury's calculation of compensatory damages was raised while the jury was still impanelled. Judge

[8] The full text of Judge McNaught's memorandum opinion setting aside the jury's verdict is set forth at (A-21 through A-24). Revisionist readings of Judge McNaught's mind by Judge Keeton and by the First Circuit which attempt to broaden his concerns to include Rule 59 "weight of the evidence" issues cannot obscure the fact that the only basis for setting aside the jury's verdict articulated by Judge McNaught were questions under Rule 49.

McNaught chose to excuse the jury before raising the question with counsel.[9] As he stated:

> . . . In a way, I almost was tempted when they [the jury] returned the verdict to stop them and make them answer some more questions. And I said no, I can't do that. That is not the function of a Judge. It's the function of the lawyers to make me do things of that sort. But I cannot spontaneously order a jury to do something like that. (A-28, A-29).

After the trial court set the entire jury verdict aside, plaintiff-petitioner unsuccessfully sought a writ of mandamus from the First Circuit. (A-70, A-71). Faced with the extraordinary financial and logistical burden of repeating a massive jury trial of its claims,[10] Cool Light reluctantly participated in a second trial before Judge Keeton[11] in which it relied primarily upon the transcript of its jury trial. Judge Keeton ruled from the bench for GTE, relying upon a theory of market infallibility not pressed by either party in more than seven years of litigation.[12] Cool Light then took this appeal

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[8] Counsel made no effort to raise the issue while the jury was impanelled and able to defend its verdict, even when invited by the trial court to do so. (A-38).

[9] Counsel made no effort to raise the issue while the jury was impanelled and able to defend its verdict, even when invited by the trial court to do so.

[10] The original 24-day jury trial consumed enormous resources, with 17 out of 23 witnesses coming from California to testify, and several of the others - including experts - coming from other states as well. A second jury trial would have been prohibitively expensive. Moreover, a critical witness, Michael Landon, died before a second jury trial could be held.

[11] Judge McNaught had retired.

[12] Judge Keeton candidly admitted basing his decision at least in part on his belief that the market's failure to have developed products similar to those once offered by Cool Light demonstrated that its products were not marketable, notwithstanding substantial evidence that Cool Light, before doing business with GTE, had enjoyed significant success in that marketplace. (A-64 through A-67). But see, *Kodak* v. *Image Technical Services*, __ U.S. __, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992), limiting *Matsushita*

to the First Circuit from Judge McNaught's order granting a new trial.

Characterizing the case as "unusual and perplexing", *Cool Light*, 973 F.2d at 32 (A-3), the First Circuit never identified the precise ground for its decision upholding the District Court. Recognizing that Rule 49, standing alone, could not justify the total destruction of the jury's verdict, the Circuit Court dropped hints of a possible Rule 59 problem, id. at 34, n.4 (A-6), but never explained why the trial court's articulated concerns about the jury's awards of compensatory damages - even if valid - should result in the total destruction of the liability and punitive damage aspects of the jury's verdict.

In upholding the District Court, the Circuit Court applied an exceedingly deferential standard of appellate review, holding that a jury verdict may be totally rejected by a trial judge so long as it is not a "miscarriage of justice" for him to do so. *Id.* at 36. (A-10).

After denial of a timely petition for rehearing and rehearing en banc, Cool Light filed this petition for a writ of certiorari in an effort to vindicate its Seventh Amendment rights.

Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). At least one role of the Seventh Amendment is to shield litigants from such idiosyncratic judicial fact-finding.

REASONS FOR GRANTING THE WRIT

I. The Chaotic State Of The Law Governing the Grant of *New Trials* Pursuant to Rules 49 and 59 Calls For the Intervention of This Court

It has been almost twenty-five years since this Court used its certiorari power to clarify the relationship between the Seventh Amendment and the power of federal courts to overturn a jury verdict. *International Terminal Operating Co.* v. *Nederl*, 393 U.S. 74, judgment amended, 393 U.S. 995 (1968). See Schnapper, Judges Against Juries, 1989 Wisc. L. Rev. 237, 238-246. During that time, the divergence among the Circuits has grown unacceptably chaotic and the area has lost any semblance of predictability. Only this Court can bring order out of chaos by definitively articulating the procedural protections mandated by the Seventh Amendment before a jury verdict may be swept aside under Rule 49 or 59.

Tension exists between the command of the Seventh Amendment that questions of fact be resolved by a jury and the power of federal judges to set aside jury verdicts under Rules 49 and 59 of the Federal Rules of Civil Procedure.[13]

[13] Justices Black and Douglas warned of the likelihood of cases like the one which prompts this petition at the time when Rule 49 was being considered for adoption. They foresaw the potential for abuse of judicial power by resort to "such devices", which

> are used to impair or wholly take away the power of a jury to render a general vedict. One of the ancient, fundamental reasons for having general jury verdicts was to preserve the right of trial by jury as an indispensable part of a free government. Many of the most famous constitutional controversies in England resolved around litigants' insistence, particularly in seditious libel cases, that a jury had the right to render a general verdict without being compelled to return a number of subsidiary findings to support its general verdict. Some English jurors had to go to jail because they insisted on their right to render general verdicts over the repeated commands of tyrannical judges not to do so. Rule 49 is but another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases according to their own judgments. A scru-

Ideally, the tension should be defused by a set of six sensible, constitutionally-mandated procedural protections designed to insulate the Seventh Amendment from erosion. This case is an unfortunate catalogue of the consequences of disregard of those procedural rules.

The procedural protections are simply stated. First, a trial judge who sets aside a jury verdict as internally inconsistent under Rule 49, or as against the weight of the evidence under Rule 59, should describe with precision the flaw in the verdict that justifies judicial interference with the jury's work. Such a requirement of clear statement is triply necessary: (1) to assure that the decision is not lightly taken; (2) to assure adequate appellate review; and (3) to assure that untainted aspects of the verdict may be salvaged.

Second, when the concern is jury inconsistency under Rule 49, if the inconsistency can, with intellectual honesty, be resolved in favor of sustaining the verdict, respect for the Seventh Amendment compels that that path be taken.

Third, if the Rule 49 inconsistency or confusion can be resolved before the jury disbands, the parties and the trial judge must make a good faith effort to do so, or else be deemed to have waived the issue unless grave injustice would result.

Fourth, in determining whether to set a jury verdict aside as against the weight of the evidence under Rule 59, a trial judge may not function as a 13th juror with a "trump card". Only verdicts so insupportable that they would constitute a grave injustice may be disturbed.

Fifth, under both Rules 49 and 59, if an untainted portion of the verdict may be saved without creating injustice to the parties, the Seventh Amendment requires the trial judge to preserve what he or she can of the jury's work.

> tiny of the special verdict and written interrogatory cases in appellate courts will show the confusion that necessarily results from the employment of these devices and the ease with which judges can use them to take away the right to trial by jury.

Statement of Black and Douglas, JJ., 374 U.S. 867-868 (1963).

Sixth, the Circuit Courts have the power and the duty to assure that the Seventh Amendment is respected, and must enforce adherence to the constitutionally-mandated procedural rules whenever a jury verdict is set aside.

Unfortunately, the transfer of fact-finding power in this case from the jury to a judge with an idiosyncratic economic theory was carried out with near total disregard for the procedural guaranties designed to preserve the jury's work.

First, at no level of this case - not in the District Court and not on appeal - has anyone explained exactly what was wrong with the jury's verdict. The only articulated concern with the jury's careful answers to interrogatories and verdicts dealt with potential inconsistencies in the allocation of compensatory damages. Such a concern could have been readily resolved (see *infra* at 16 through 19); was waived by a failure to have raised it before the jury disbanded; and, in any case, could not justify setting aside the liability and punitive damage aspects of the jury's verdict. Yet, by the time the First Circuit had rendered its decision, the trial judge's concern had apparently mutated into a Rule 59 ruling. Even that is uncertain, however, since the Circuit never explicitly invoked Rule 59.

The fact is that a multi-million dollar jury verdict has been set aside - and neither the parties, nor this Court, know why.

Second, the lower courts simply ignored or paid only lip service to the requirements that perceived jury inconsistencies be resolved in favor of saving a verdict, if possible, and that questions be raised before the jury disbands in order to permit clarification.

Third, the trial judge apparently viewed himself as a superjuror, setting aside a jury verdict amply supported by the evidence simply because he disagreed with it.

Fourth, the trial judge made no effort to save those portions of the verdict which were unrelated to his expressed concerns. An articulated concern with the calculation or allocation of compensatory damages was used to destroy the liability and punitive damage aspects of the verdict.

Finally, the First Circuit applied the wrong standard of review; it treated the decision to set aside a jury verdict as though it were a decision to sustain the verdict instead of a decision to overturn it, and it imposed a burden on the petitioner to demonstrate an abuse of discretion. The review should be plenary, with appellate deference to the jury, not the trial judge.

It is tempting to ascribe the multiple failures below to a simple breakdown in this case. But that would be wrong. The treatment of Rules 49 and 59 in the lower courts is a shambles precisely because a definitive statement of the procedural rules designed to defuse the tension between Rules 49 and 59 and the Seventh Amendment exists only in the aspirations of the trial bar. No Circuit enjoys a clear and unambiguous statement of all six governing rules. And the gulf between the Circuits in the articulation of what passes for rules is enormous and growing.

For example, only the Second Circuit requires a clear statement of reasons for setting aside a jury's verdict under Rules 49 and 59. *Crane* v. *Consolidated Rail Corp.*, 731 F.2d 1042, 1050-51 (2d Cir.) (Friendly, J.), *cert. denied*, 469 U.S. 854 (1984). In every other Circuit, cases like this one, where litigants and reviewing courts guess about why a verdict was set aside, are legion. Unfortunately, the Second Circuit's salutary rule requiring a statement of reasons before setting aside a jury verdict is rendered meaningless by that Circuit's indefensible refusal to entertain appeals from orders granting new trials under Rule 59. *Dunlap-McCuller* v. *The Riese Organization et al.*, __ F.2d __, 1992 WL 345704 (2d Cir. November, 25, 1992); *Kirschner* v. *Office of the Comptroller of the City of New York*, 973 F.2d 88, 96 (2d Cir. 1992).

The Circuits are also in profound disagreement as to the proper standard a trial judge should follow in deciding whether to set a jury verdict aside under Rule 59. The standards range from the thinly disguised "13th" juror standard used in this case to a requirement that the verdict constitute

a gross miscarriage of justice. See 11 Wright and Miller, Federal Practice and Procedure, Sec. 2806 ("The power of a federal judge to grant a new trial on the ground that the verdict was against the weight of the evidence is clear. The standard that is to control in passing on motions of this kind is not.") See generally, *Lind* v. *Schenley Industries Inc.*, 278 F.2d 79 (3d Cir.), cert. denied, 364 U.S. 835 (1960).

Similar confusion characterizes the power - and duty - to preserve untainted aspects of a jury verdict, even while ordering a partial new trial. *Gasoline Products Company* v. *Champlin Refining Company*, 283 U.S. 494 (1931). In this case, the First Circuit made absolutely no effort to preserve unrelated aspects of the jury's verdict. Thus, the trial court's articulated concern with the narrow question of the jury's calculation of compensatory damages was permitted to destroy the jury's liability findings and its findings on punitive damages. In contrast to the First Circuit's blunderbuss approach in this case, several Circuits require trial judges to preserve untainted aspects of a verdict. See, e.g., *Maxey* v. *Freightliner Corp.*, 727 F.2d 350, 352 (5th Cir. 1984); *Crane*, 731 F.2d at 1050.

The Circuits are in even more profound disagreement over the proper standard for reviewing the grant of a new trial. In this case, the First Circuit adopted an extremely deferential standard of review, upholding the grant of a new trial under Rule 49, and possibly Rule 59, so long as setting aside a jury verdict would not constitute a "miscarriage of justice". 973 F. 2d at 36 (A-10). Even more dramatically, the Second Circuit continues to insist that the grant of a new trial is completely unreviewable. *Portman* v. *American Home Products*, 201 F.2d 847, 848 (2d Cir. 1953); *Dunlap-McCuller, supra.* In contrast, several Circuits correctly exercise heightened or strict review over grants, but not denials, of new trials. See, e.g., *Redd* v. *City of Phenix City*, 934 F.2d 1211, 1214 (11th Cir. 1991); *Digidyne* v. *Data Gen. Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984), cert. denied, 473 U.S. 908, reh'g denied,

473 U.S. 926 (1985); *Shows* v. *Jamison Bedding, Inc.*, 671 F.2d 927, 931 (5th Cir. 1982). Several Circuits review both grants and denials under an abuse of discretion standard. *Taylor* v. *Washington Terminal Co.*, 409 F.2d 145, 147 (D.C. Cir. 1969), cert. denied, 396 U.S. 835 (1969).

The net result of the chaos in the lower courts is the wholly-unnecessary waste of substantial resources by litigants and by the courts. Even more disturbing, the chaotic state of the law governing Rules 49 and 59 has transformed what should be a relatively straightforward application of a set of common sense norms into an unpredictable and expensive lottery. A lottery in which, as this case bears sad witness, the loser is the Seventh Amendment.

II. The Writ Should be Granted to Resolve the Conflict Among the Circuits Created by the First Circuit's Aberrant Approach to Appellate Review in Rule 49 Cases, and to Assure Compliance with this Court's Mandate in *Atlantic and Gulf Stevedores* and *Gallick*.

As this case illustrates, Rule 49 poses the risk that a trial judge who disagrees with a jury verdict may seize on perceived inconsistencies in the jury's work as a justification for overturning the verdict. In *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), this Court attempted to close that Rule 49 loophole by insisting that the jury's disposition of the case must be upheld if there is a possible view of its work which reconciles any alleged inconsistencies. Two years after *Atlantic and Gulf Stevedores*, in *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963), this Court re-affirmed its strong commitment to the integrity of jury verdicts in the face of claims of Rule 49 inconsistency, stating:

> . . . it is the duty of the courts to attempt to harmonize the [jury's] answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.'

The First Circuit is unique in placing a gloss on the rule of *Atlantic and Gulf Stevedores* and *Gallick* which has the effect of eviscerating it. In *Atlantic Tubing & Rubber Company* v. *International Engraving Company*, 528 F.2d 1272 (1st Cir. 1976), the First Circuit denied that it had an obligation to reverse the trial court in a Rule 49 case even if, on review of the record, it could plausibly construe the work of the jury in a consistent manner. The mandate of *Atlantic and Gulf Stevedores* and the *Gallick* case, the First Circuit argued, applies only when the trial court enters judgment in accord with the jury's dispositions of the case and the Court of Appeals is asked to reverse on the grounds of jury inconsistency. Where the trial court finds inconsistency, said the First Circuit, it "should not be reversed simply because an appellate court concludes that it is possible to reconcile the jury's responses." *Id.* at 1276.

As a result, in the First Circuit, the vigilant protection of jury findings insisted upon by *Atlantic and Gulf Stevedores* in the name of the Seventh Amendment is relaxed; worse, it is relaxed in precisely those cases where it ought to be most energetically pursued, namely, in those cases where, as in this case, a trial judge has succumbed to the temptation to become a super-juror, and has substituted his judgment for that of the jury under the guise of a Rule 49 decision.

No other Circuit has adopted the First Circuit rule in the seventeen years since it was announced. In *Bradford-White Corp.* v. *Ernst & Whinney*, 872 F.2d 1153 (3rd Cir.), *cert. denied*, 459 U.S. 1087 (1989), for example, the Third Circuit reasoned that this Court's decision in *Atlantic and Gulf Stevedores* could only be understood as binding trial courts and appellate courts alike. The Third Circuit held that its review

of the trial court of necessity must be *plenary* in such cases, *Id.* at 1158, because deference in such a case must be to the jury, not to the trial judge. The Tenth Circuit has similarly recognized that the Seventh Amendment and this Court's decisions in *Atlantic and Gulf Stevedores* and *Gallick* require it to closely scrutinize District Court findings of inconsistency. *Diamond Shamrock Corp.* v. *Zinke & Trumbo, Ltd.*, 791 F.2d 1416 (10th Cir.), *cert. denied*, 479 U.S. 1007 (1986).

In this case, the First Circuit's opinion is laced with frank avowals of this deference - a deference explicitly rooted in the erroneous *Atlantic Tubing* rule. *Cool Light*, 973 F.2d at 35-36.[14] That deference led the appellate court to endorse uncritically the trial court's strained view of the jury's verdicts as inconsistent.

Asked by special interrogatory whether GTE had made false representations to the plaintiff Cool Light, the jury answered "yes". (A-12). Asked to specify to substance of the misrepresentation, the jury responded with technical perfection: "that GTE had the ability to produce, in volume, a quality product of dichroic coated reflectors per the specifications disclosed by Cool Light Inc". (A-13). Asked whether Cool Light had relied upon this false representation to its damage, and further, whether GTE and Cool Light had entered into written and oral agreements, the jury again answered "yes" to each of these queries. (A-13). And most importantly, asked "If Cool Light lost potential profits as a result of GTE's conduct, what was the amount of lost profits?", the jury responded simply and flatly: $9,300,000.00. (A-13). There is complete clarity and consistency in these firm, sharp, and entirely lucid jury findings.

The jury returned three general verdicts granting Cool Light damages. On the fraud count, the jury found damages in the

[14] In its most extreme form, that deference led the Appeals Court to agree that the trial judge had a duty to attempt to reconcile any perceived inconsistencies, but to conclude that he met that duty simply by stating: ". . . I have struggled in vain to come up with a sensible mode of determining how the jury would have struck upon different figures . . . ." *Cool Light*, *id.* (A-6).

sum of $9,450,000.00 (A-17); on the contract count the jury awarded Cool Light $3,694,000.00 (A-18); and on the good faith and fair dealing count, $2,800,000.00. (A-19). Asked by the trial judge whether any of these sums represented punitive damages, the jury responded that $6,500,000.00 of the fraud verdict was for punitive damages. (A-37 through A-39).

Having been instructed that lost profits were at the heart of Cool Light's damage claim, and having found that Cool Light's lost profits totaled $9,300,000.00, the jury awarded compensatory damages in the amount of $9,444,000.00. That too, is entirely unexceptional, since the trial judge also instructed the jury that it could include "out-of-pocket" expenses in its calculations under the fraud count, and that under the contract count, it could include, in addition, whatever sum was necessary to "make Cool Light whole." See *supra* at 5

There was abundant evidence in the record to support the jury's finding that the plaintiff's lost profits were substantial. By 1979, its lighting products were being used in 75% of the new film productions of television network prime time programming.[15] As a direct result of the defendant's refusal to supply the plaintiff with a critical component for its lighting systems, the company was forced first to curtail, then to stop altogether, its operations.[16] At the time of trial, the plaintiff had been out of business for approximately eight years.[17]

The only grounds offered by the trial judge for upsetting the jury's verdicts was its distribution of the $9,444,000.00 of

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[15] Vol. 23, pp. 56-57.

[16] Plaintiff's Trial Exhibit 35.

[17] Two expert witnesses testified in support of the plaintiff's damage claims, and each offered reasonable business scenarios in which the company's lost profits were substantially in excess of those awarded by the jury. An internal memorandum of the defendant did the same. Vol. 14, p. 3, through Vol. 15, p. 31.; Vol. 23, pp. 16-44. Plaintiff's Trial Exhibits 78 and 79.

compensatory damages among the three verdicts. Given a finding by the jury of lost profits totaling $9,300,000.00, and the implicit finding[18] of incidental damages totaling another $144,000.00, the trial judge expected the jury to attribute the full amount of lost profits of $9,300,000.00 to each of the three counts. Nothing in his instructions, however, indicated to the jury that they should prepare the general verdict forms in that way, and in the light of this omission, the jury can hardly be faulted - or found inconsistent or confused - simply because it undertook to allocate the lost profits among the three counts and to add a small amount of other, compensable damage.

In the end, the only reason given by the trial judge for his decision to upset a jury verdict in favor of the plaintiff for nearly sixteen million dollars was the fact that the jury's award of compensatory damages was distributed somewhat unequally among the three counts! But the judge's instructions to the jury could only have led them to such a distribution. He gave the jury different instructions as to the measure of damages on each count,[19] instructions that trained lawyers as well as the lay jury would naturally have treated as calling for the award of different amounts on the counts in question. The jury could have simply been responding to such instructions; or it might have been apportioning the total amount of lost profits - which, by their nature, accrue annually - among the three counts based on its judgment as to the timing of, and comparative harm caused by, different aspects of the plaintiff conduct. Even if — as is far from likely — the jury was somewhat arbitrary in distributing the total damages among the counts, that was neither injurious to the defendant nor a good reason for doubting the soundness of the total ver-

[18] The trial judge refused Cool Light's request that the jury be asked to itemize other elements of compensatory damage in its answers to interrogatories. (Vol. 24, pp. 44-45.) The trial judge later seized upon that very lack of specificity in the jury's findings as a reason to nullify its verdicts. (A-23).

[19] The three relevant charges are set forth supra at pp. 7-8.

dict, given the flat, unambiguous finding that the defendant's conduct cost the plaintiff $9,300,000.00 in lost profits.

What the Court of Appeals *guessed* the trial judge *might* have found troubling with the allocation of damages among the three counts was the *possibility* that the jury might have awarded the plaintiff duplicative damages for the same injury because of the multiplication of legal counts. This is at most a remote possibility, and it most emphatically is *not* signaled by the unevenness of the jury's awards. In this case, the jury, given an exacting set of interrogatories, one of which was crafted by the trial judge to isolate and determine only one of several elements of compensable damage, explicitly found that that most important element of the plaintiff's injury, the loss of profits, totaled $9,300,000.00.

The trial judge was plainly unsympathetic with the plaintiff's claims, and ruled adversely to them on all issues that were his to decide. (A-39 through A-43). But that of course, is precisely the point. The jury issues were not his to decide. Yet instead of the several, entirely plausible and consistent explanations for the jury's verdicts, the trial judge seized upon one rather strained *possibility*, an explanation that seems to have little to commend it other than the slim grounds it offered him for unseating the jury's decision. This is precisely what the rule of *Atlantic and Gulf Stevedores* and *Gallick* condemns.

III. The Writ of Certiorari Should Be Granted to Resolve the Disarray Among the Circuits As to the Requirement That Questions of Jury Consistency Be Raised Before the Jury is Excused.

There was, of course, a way in which the destruction of the jury verdict in this case could have been avoided. There was nothing hidden or subtle about the jury's answers to special interrogatories or its general verdicts. Had the defendant, or the trial judge, simply raised the question with the jury

before its discharge as to the basis of its calculation of separate damages for each of the three counts upon which it found liability, the jury could have retired briefly and returned with an answer. Six weeks of effort by the jury, the parties and the court, and the integrity of the Seventh Amendment could have been preserved.

But the defendant, when asked for advice by the trial judge, said nothing, and let the opportunity to secure clarification of any doubts or questions as to the consistency of the jury's findings pass. The trial judge, too, said nothing, and discharged the jury, when a small effort on his part and a small responsive effort on the part of the jury could easily have saved the jury's verdict.

That the trial judge did nothing is singularly regrettable, for, by his own admission, he was fully aware of the issue that was to lead him later to invalidate the jury's work. See *supra* at 7. The trial judge's conscious decision to allow the jury to separate before raising his Rule 49 concerns was careless and shocking. Nagging doubts exist that the respondent may have deliberately allowed the jury to be discharged in order to gain some chance of subverting the jury's verdict. The trial judge's decision to delay the Rule 49 inquiry until the jury had disbanded unhappily raises the darker, companion concern that the trial judge himself was not anxious to preserve the jury verdict.

The case at bar is thus a textbook example of the reasons behind the rule in many but not all Circuits that inconsistencies involving special interrogatories and general verdicts must be raised before the jury is excused. *Strauss* v. *Stratojac Corp.*, 810 F.2d 679, 683 (7th Cir. 1987).

Like a number of important aspects of Rule 49 procedure, however, the validity and scope of this "waiver" rule is a matter about which the Circuits are in considerable disarray and conflict. In Rule 49(b) cases, at least, many Circuits

appear to agree that concerns of inconsistency must be raised before the jury is discharged.[20]

But other Circuits have resisted such a rule, primarily on the reasoning that it is the duty of the trial judge under Rule 49(b) to respond to problems of inconsistency, whether or not the parties call such problems to his or her attention. See, e.g., *Schaafsma* v. *Morin Vermont Corp.*, 802 F.2d 629, 634 (2d Cir. 1986); *Los Angeles Nut House* v. *Holiday Hardware Corp.*, 825 F.2d 1351 (9th Cir. 1987). While the Fifth Circuit's decision in *Stancill*, *supra*, is sometimes regarded as committing that Circuit to a waiver rule in 49(b) cases, the Fifth Circuit appears more recently to have cast its lot with the non-waiver circuits. See *Brunner* v. *Maritime Overseas Corp.*, 799 F.2d 296 (5th Cir.), cert. denied, 476 U.S. 1115 (1986).

The uncertainty and conflict among the Circuits as to Rule 49(b), is, if anything, exacerbated in jury inconsistency cases that are seen as falling outside Rule 49(b) — as in Rule 49(a) cases.[21] This confusion is compounded still further by the fact

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[20] See, e.g., *Fernandez* v. *Chardon*, 681 F.2d 42, 58 (1st Cir.), cert. denied, 459 U.S. 989 (1982), aff'd, sub. nom., *Chardon* v. *Soto*, 462 U.S. 650 (1983); *White* v. *Celotex Corp.*, 878 F.2d 144 (4th Cir.), cert. denied, 493 U.S. 964 (1989); *Tennessee Consolidated Coal Co.* v. *United Mine Workers*, 416 F.2d 1192, 1200-01 (6th Cir. 1969), cert. denied, 397 U.S. 964 (1970); *Stancill* v. *McKenzie Tank Lines, Inc.*, 497 F.2d 529, 534-35 (5th Cir. 1974) (but see discussion below); *Strauss.*, 810 F.2d at 683; *Diamond Shamrock*, 791 F.2d at 1423.

[21] See *Bates* v. *Jean*, 745 F.2d 1146, 1150 (7th Cir. 1984) (generally noting conflict among circuits in the Rule 49(a) context); Note, *Resolving Inconsistencies in Federal Special Verdicts*, 53 Fordham L.Rev. 1089, 1100-01 (1985) (surveying the conflicting circuit law on the requirements for preserving an objection under Rule 49(a)). See also, e.g., *Malley-Duff & Assoc., Inc.* v. *Crown Life Ins. Co.*, 734 F.2d 133 (3rd Cir.), cert. denied, 469 U.S. 1072 (1984) (no 49(a) waiver); *Ladnier* v. *Murray*, 769 F.2d 195 (4th Cir. 1985) (no 49(a) waiver); *Alverez* v. *J. Ray McDermott & Co.*, 674 F.2d 1037 (5th Cir. 1982) (no 49(a) waiver); *Skillin* v. *Kimball*, 643 F.2d 19 (1st Cir.1981) (generally regarded as 49(a) waiver case, but not cited or followed in case at bar); *Itel Capital Corp.* v. *Cups Coal Co.*, 707 F.2d 1253 (11th Cir. 1983) (49(a) waiver).

that many cases involving the possibility of inconsistency among a jury's various findings cannot neatly or easily be categorized as falling within one or another of these provisions, forcing the Courts of Appeal to draw distinctions that seem removed from the powerful concerns that drive the waiver rule in this context. See, e.g., *Simmons* v. *City of Philadelphia*, 947 F.2d 1042, 1056-58 (3rd Cir. 1991), cert. denied, __ U.S. __, 112 S.Ct. 1671, 118 L.Ed.2d 391 (1992) (verdict sheet not fitting either part of Rule 49).

In this case, the trial judge saw the purported problem with the jury's responses immediately, and could have dealt with the question fairly and expeditiously by simply asking the jury for clarification before he discharged it, but chose not to, in favor of completely erasing weeks of work by a unanimous ten-person jury and eradicating the plaintiff's hard-won verdict. When a litigant or the trial judge knows of the existence of an issue of jury inconsistency, there can be no excuse for a decision to suppress identification of that issue until the jury has been discharged.

IV. The Writ Should Be Granted to Clarify and Enforce the Seventh Amendment Obligation to Preserve Untainted and Separable Aspects of a Jury's Verdict.

As petitioner has demonstrated, the only articulated basis for setting aside the jury's verdict was concern over the allocation of compensatory damages. No plausible basis was suggested for overturning the jury's careful findings on liability or for interfering with the jury's findings on punitive damages. Yet the trial judge parlayed his concern over the allocation of compensatory damages into a full scale assault on every aspect of the jury's verdicts. The Seventh Amendment forbids such a cavalier approach to a jury's work. In effect, the trial judge applied the pre-1931 "all or nothing" test — a test that was repudiated by this Court in *Gasoline Products*, *supra*.

The trial judge considered granting a new trial confined to

the issues of damages, but decided to order both compensatory and punitive liability re-tried solely because, in his view, a trial on the amount of punitive damages could not be separated from a trial of punitive liability (A-23 and A-24). With respect, the trial court's reasoning on this point contains several glaring *non-sequiturs*. First, Judge McNaught never even suggested a reason to re-try the jury's explicit and precise finding that GTE was liable for compensatory damages. Even if one assumes — erroneously — that it was appropriate to re-try any, or even all, punitive liability issues, no basis whatever existed for destroying plaintiff's jury verdict on the issue of compensatory liability. In fact, nothing in Judge McNaught's musings about the verdicts suggests a basis for re-trying the amount of punitive damages. Given the size and wealth of the defendant and the fact that the jury had found it guilty of fraud and bad faith dealing, the jury's punitive award was a modest one. *Pacific Mutual Life Ins. Co.* v. *Haslip*, __ U.S. __, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

Finally, even if one assumes — erroneously — that a basis existed to re-try the amount of punitive damages, no basis existed for setting aside the jury's careful liability findings — compensatory or punitive. Once the jury had found the requisite fraud and bad faith to warrant punitive damages, no basis existed to force the plaintiff to win the punitive liability battle again merely to establish the amount of punitive damages. Inexplicably, the First Circuit, although expressly asked to do so, did not even consider whether it was error for the trial judge to set the entire verdict aside.

V. The Writ Should Be Granted to Clarify and Enforce the Seventh Amendment Requirement That a Precise Statement of Reasons Accompany a Decision to Set Aside a Jury Verdict.

The opinion below apparently recognized that Judge McNaught's concerns over compensatory damage calcula-

tions, standing alone, could not justify destruction of plaintiff's entire verdict, both because they had been waived and because they did not implicate the jury's liability findings. *Cool Light*, 973 F.2d at 34, n.4. (A-6). Accordingly, the Circuit Court opinion sought to buttress the case for sweeping away the entire verdict by speculating that Judge McNaught might have intended to invoke more than Rule 49(b) to set aside the entire verdict. Where, however, a trial judge sweeps aside a jury's verdict, the judge must articulate a basis for his action, both to assure that jury verdicts are not casually ignored and to permit an appellate tribunal to carry out its responsibility. *Crane*, 731 F.2d at 1050. See generally, *North Carolina* v. *Pearce*, 395 U.S. 711, 726-27 (1969). Except for the articulated Rule 49(b) concerns, no such reason was given in this case; every articulated concern centered solely on inconsistencies under Rule 49.

The statement of reasons which satisfied the Circuit panel below does not come close to satisfying minimum standards of fairness compelled by the Seventh Amendment. The panel noted that Judge McNaught considered the grant of a judgment n.o.v. on one or more of the three liability counts on which the jury found for the plaintiff. *Cool Light*, *supra* at 33-34. (A-8 and A-9). However, read in context, Judge McNaught's comments establish that, in his opinion, the jury's verdict was justified on at least one of the three liability counts and that his real concern was that he could not understand how damages had been allocated among the counts. (A-24).[22] In any event, it is intolerable to force litigants and a reviewing tribunal to play guessing games with the integrity of a jury verdict. The absence of anything resembling a coherent statement of reasons beyond the articulated Rule 49 concerns,

[22] Judge McNaught's concern about the necessity of confronting the allocation issue reveals his clear belief that liability was properly found on at least one count. Unless at least one count was clearly valid, no reason would have existed to worry about allocation.

precludes the attempt to convert this case into an implied Rule 59 proceeding.

VI. The Writ Should Be Granted to Clarify and Enforce the Standard of Appellate Review Compelled by the Seventh Amendment When a Trial Court Sweeps Away a Jury Verdict.

The First Circuit applied an extraordinarily deferential standard of review to the trial court's decision to sweep away the entire jury verdict. *Id.* at 33-34, 36 (A-9 and A-10). As the opinion below candidly avows, the trial court's decision to overturn the jury's verdict was to be upheld as long the trial judge's decision was "not a miscarriage of justice". *Id.* at 36. But such a deferential standard is 180 degrees off course. The Seventh Amendment commands, instead, that a trial court's decision to set aside a jury verdict be scrutinized on appeal to determine whether the action was necessary to *avoid* grave injustice.

In part, the First Circuit's unduly deferential standard flows from the erroneous approach to Rule 49 cases adopted in *Atlantic Tubing*. See *supra* at 14 through 19. In part, the deferential standard is a relic of the days when grants and denials of new trials were not reviewable at all. *Portman*, 201 F.2d at 848. Where, however, a trial judge acts to set aside a jury verdict, as opposed to retaining it, respect for Seventh Amendment values requires a meaningful appellate process designed to assure compliance with the procedural protections mandated by the Seventh Amendment.

In this case, the appellate process: Excused blatant violations of settled procedures under Rule 49; toyed with the dangerous notion of an implied Rule 59 case in flat violation of the requirement that reasons be given before a jury verdict is swept away; totally ignored the duty to salvage untainted, separable portions of a jury verdict; and tolerated a judge behaving as a 13th juror. The net result was the trashing of

the Seventh Amendment and the perpetuation of a chaotic, wholly unpredictable state of affairs in the trial courts.

CONCLUSION

For the above-stated reasons a writ of certiorari should issue to the Court of Appeals for the First Circuit herein.

Respectfully submitted,
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Dated: January 12, 1993

United States Court of Appeals
For the First Circuit

No. 92-1082

COOL LIGHT COMPANY, INC.,
PLAINTIFF, APPELLANT,

v.

GTE PRODUCTS CORPORATION,
DEFENDANT, APPELLEE.

JUDGMENT

Entered: August 21, 1992

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc. Messrs. McCabe and Van Gestel]

United States Court of Appeals
For the First Circuit

No. 92-1082

COOL LIGHT COMPANY, INC.,
PLAINTIFF, APPELLANT,

v.

GTE PRODUCTS CORPORATION,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[HON. ROBERT E. KEETON, *U.S. District Judge*]

Before

BREYER, *Chief Judge*,
LAY,* *Senior Circuit Judge*,
and O'SCANNLAIN,** *Circuit Judge*.

Edwin A. McCabe with whom *Joseph P. Davis, III*, *Karen Chinn Lyons* and *The McCabe Group* were on brief for appellant.
Alan van Gestel with whom *Marie P. Buckley* and *Goodwin, Procter & Hoar* were on brief for appellee.

August 21, 1992

*Of the Eighth Circuit, sitting by designation.
**Of the Ninth Circuit, sitting by designation.

LAY, *Circuit Judge.* This is an unusual and perplexing case. Cool Light Company, Inc. (Cool Light) sought to develop and produce a new and superior light system for television and movies which would emit less heat, would last longer, and would produce better color quality on film. The lights, not surprisingly, were to be called "cool lights." Cool Light's founder, George Panagiotou, obtained all rights to the lighting concept and took his idea to Hollywood where he founded Cool Light in 1977. In 1978, Panagiotou was looking for a new supplier of specially coated reflectors needed to produce cool lights. He was approached by GTE Products Corporation (GTE) to produce the reflectors and the two parties entered into a business relationship which continued throughout 1979 and 1980.

Dissatisfaction arose over the supply of coated reflectors, both in number and in quality, and problems arose over amounts owed by Cool Light to GTE. Cessation of supply resulted and Cool Light, facing a severe cash shortage, ultimately was forced to sell off its assets and became insolvent.

Cool Light sued GTE on a number of claims, including breach of contract, breach of implied covenant of good faith and fair dealing, and fraud. After a twenty-four day trial, the district court[1] submitted to the jury a number of special interrogatories in addition to general verdict forms. On the special interrogatory form, the jury found, *inter alia:* (1) GTE had made a false representation to Cool Light that it could produce the number and quality of reflectors required, (2) Cool Light relied upon that misrepresentation, (3) Cool Light and GTE had both an oral and written agreement, and (4) GTE's actions cost Cool Light $9.3 million in loss of potential profits. The general verdict forms, however, indicated that Cool Light was due $3.694 million on the breach of contract claim, $2.8 million on the breach of implied covenant of good faith claim, and $9.45 million on the fraud claim. After the jury returned the verdict and special interrogatories, the court

[1] The Honorable John J. McNaught, presiding.

sent the jury back into the jury room to decide how much, if any, of the fraud damages were punitive. The jury returned with the answer that $2.95 million were compensatory in nature and $6.5 million represented punitive damages permitted under California law.

In addition to the above, the jury returned a verdict for GTE on all other counts, including common law misappropriation of trade secrets, misappropriation of trade secrets under Mass. Gen. L. ch. 93, § 42 (1990), misappropriation of information under section 759 of the Second Restatement of Torts, and misappropriation of trade secrets under the California Uniform Trade Secrets Act, Cal. Civ. Code § 3426 (West 1992).[2] The jury also found against GTE on a counterclaim. An additional five counts, considered to be sounding in equity, were tried by the court.[3]

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[2] The record is confusing as to whether this count was submitted to the jury. In Judge McNaught's August 9, 1990 memorandum and order he states that the count was submitted to the jury and that it found in favor of GTE. Judge McNaught also included this count in the list of those he intended to be retried. The final judgment entered December 11, 1991, however, indicates that this count was withdrawn before trial. There is some evidence on the record that the California statute was not in effect at the time the alleged misconduct occurred.

[3] Cool Light challenges the trial court's ruling in favor of GTE on Cool Light's claim that GTE violated Chapter 93A of the General Laws of the Commonwealth of Massachusetts, which makes unlawful any "[u]nfair . . . acts or practices in the conduct of any trade or commerce. . . ." Mass. Gen. L. ch. 93A, § 2(a)(1990). Cool Light argues that the jury's finding that GTE violated the implied covenant of good faith and fair dealing required the court as a matter of law to find that GTE violated Chapter 93A. Cool Light cites *Anthony's Pier Four* v. *HBC Associates*, 583 N.E.2d 806 (Mass. 1991), in support of this argument. In *Anthony's*, the trial court found in favor of plaintiff on its ruling that defendant had violated the implied covenant of good faith and fair dealing, but the court denied plaintiff's claim under Chapter 93A. The Supreme Judicial Court of Massachusetts found that those rulings could not be squared, and that defendant as a matter of law violated Chapter 93A.

Anthony's is distinguishable from the present case in two important respects. First, the jury finding against GTE on the implied covenant of good faith count was vacated by the trial court and submitted for retrial. Under these circumstances, the jury's finding cannot be binding on the trial court's determination under Chapter 93A.

The district court granted GTE's motion for new trial on all of the counts submitted to the jury. Thereafter, upon stipulation the parties submitted only the three counts on which the jury found in Cool Light's favor. These three counts were then submitted to a new trial judge, the Honorable Robert E. Keeton, and a jury trial was waived. It was stipulated that certain witnesses would testify, and that Judge Keeton would make his findings and conclusions of law based upon his overall appraisal of the record of the first trial and any additional evidence presented before him. Judge Keeton entered a final judgment against Cool Light on all counts and dismissed GTE's counterclaim. He did so based upon a thorough analysis of the evidence, finding that Cool Light did not sustain its burden of proof relating to breach of contract, fraud, or breach of implied covenant of good faith and fair dealing. He further found Cool Light's evidence as to loss of profits to be entirely speculative. Upon entry of final judgment, Cool Light has appealed only the grant of a new trial by Judge McNaught. It seeks to sustain the money damage award set forth in the jury's original verdict.

Cool Light argues that the trial court had a duty to reconcile the apparent inconsistency between the verdict and the special interrogatory answer pertaining to Cool Light's total lost profits, and that the court abused its discretion by failing to enter judgment in its favor. We agree with Cool Light's

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Second, the trial court made separate findings of fact and conclusions of law with respect to the Chapter 93A claim. The court specifically found (1) GTE exerted its best efforts at producing the reflectors requested by Cool Light; (2) no binding contract existed between Cool Light and GTE; (3) no agreement existed between the two parties except that GTE would not divulge Cool Light's specifications to another GTE customer; (4) GTE's conduct should be viewed as simply refusing to continue doing business with a company that would not or could not pay its bills' and (5) Cool Light's evidence on lost profits was unpersuasive. The court also made findings as to the lack of credibility of certain Cool Light witnesses, including George Panagiotou.

We therefore find no error with respect to the trial court's dismissal of Cool Light's claim under Chapter 93A.

assertion that the trial court had a duty to reconcile any inconsistency between the general verdict and the answers to the special interrogatories.[4] The record is clear, however, that Judge McNaught did attempt to reconcile the inconsistency he perceived and concluded that he could not:

> And I have struggled in vain to come up with a sensible mode of determining how the jury would have struck upon different figures of $3,550,000 [sic] $2,950,000 and $2,800.000 [sic]. It would have been easier (and more understandable) had the jury simply divided $9,300,000 by three and given $3,100,000 for lost profits on each count. They did not do so.
>
> . . . .
>
> In sum, one must speculate in order to assess the work of the jury. And that's wrong. If the plaintiff deserved a particular sum of money, he should not be required to be satisfied with a dollar less than that amount. Neither should he receive a dollar more than he deserves. On the present state of affairs, we don't know what he deserves.

---

[4] *See e.g.*, *Harvey* v. *General Motors Corp.*, 873 F.2d 1343, 1347 (10th Cir. 1989); *Schaafsma* v. *Morin Vermont Corp.*, 802 F.2d 629, 635 (2d Cir. 1986); 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2513, at 528-29 (1971); *cf. Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963) (duty to reconcile answers to special interrogatories); *O'Brien* v. *Papa Gino's of America*, 780 F.2d 1067, 1071 (1st Cir. 1986) (same).

Cool Light also urges that GTE is barred from challenging any inconsistency between the special interrogatory answers and the verdict because of its failure to object on this ground before the jury was discharged. *See Fernandez* v. *Chardon*, 681 F.2d 42, 58 (1st Cir.) (failure to object to jury verdict under Rule 49 prior to discharge of the jury waives right to appeal), *cert. denied*, 459 U.S. 989 (1982); *Skillin* v. *Kimball*, 643 F.2d 19 (1st Cir. 1981). As Judge Keeton observed, however, Judge McNaught did not base his grant of a new trial solely on the inconsistency of the special interrogatories and the general verdict. Thus, the waiver rule recognized in this circuit with respect to Rule 49(b) does not apply here.

> There must be a new trial. Of that I am satisfied. It seems to me also that the new trial should be had on *all* the counts which were submitted for the jury's determination: not only on the counts where the jury found in plaintiff's favor, but on those counts where the jury decided against him. We cannot know for the moment precisely what evidence will be offered and admitted at a new trial. If, in fact, there is admissible evidence which makes a different impression on the jurors' minds, plaintiff may (be entitled to and may) prevail on one or more of the counts on which this past jury decided adversely to him.

Cool Light Co. v. *GTE Products Corp.*, No. 86-2668Mc, at 4-5 (D. Mass. August 9, 1990) (memorandum and order on proposed orders of judgment and on motion for judgment n.o.v.).

Cool Light's argument that the verdict and answer can be reconciled hinges upon its assumption that the jury awarded separate and distinct damages for each count; that each damage award can be causally related to a separate breach of duty. Cool Light further urges that although the compensatory damages awarded on the general verdict forms add up to $9,444 million, the extra $144,000 can be explained as some other form of compensatory damages, such as out-of-pocket expenses.

The difficulty with this argument is that the trial record fails to support the theory that each claim was supported by separate damages. The trial court recognized throughout the trial that plaintiff's counts were alternative counts. In the instructions to the jury, the court explained:

> There are cases in which somebody has more than one arrow to fire; and this is one of those cases. When Mr. Panagiotou brought his case as against GTE, he decided that he ought to have 12 arrows to fire. So he stated

> what we call 12 theories of liability at law. And you're entitled to do that. When you bring a case in our courts you may say I want to recover either on the basis of tort or recover on the basis of contract. And if you can prove the essential elements of any theory of liability, then you're entitled to recover. That's called alternative pleading.

Trial Transcript, Vol. 24, at 10. These instructions made clear the alternative nature of Cool Light's case, and Cool Light itself never spelled out any basis for finding separate damages. The law is clear that a party cannot recover multiple awards of damages for a single harm. *Clark* v. *Taylor*, 710 F.2d 4, 8 (1st Cir. 1983) ("[T]he amount of compensatory damages properly awardable does not depend on the number of theories under which plaintiff may recover, but on the extent of his injury."); *see also Diversified Graphics, Ltd.* v. *Groves*, 868 F.2d 293, 295 (8th Cir. 1989); *Clappier* v. *Flynn*, 605 F.2d 519, 529-30 (10th Cir. 1979); *Cunningham* v. *M-G Transp. Serv.*, 527 F.2d 760, 761-62 (4th Cir. 1975).

Thus, not only is the answer to the special interrogatory inconsistent with the general verdicts, but the general verdicts are inconsistent with one another. In addition, we find it significant that in considering the non-jury claims Judge McNaught found no breach of contract, lack of good faith on the part of at least one of the plaintiff's witnesses, failure to prove fraud, and failure to prove damages. We mention this background because Judge McNaught observed in his new trial order:

> I considered granting judgment non obstante veredicto on one or more of the counts of the complaint which were given to the jury for determination, and decided against it, since, if a new trial is granted, new evidence might be offered. There is also the fact that even if I act in that fashion, we are still left to speculate concerning the

> award of damages, the source of the amounts decided upon by the jury, and the possibilities that the jury came up with inconsistent amounts, or amounts that were divided among the counts improperly.

Cool Light Co. v. *GTE Products Corp.*, No. 86-2668Mc, at 4-5 (D. Mass. August 9, 1990) (memorandum and order on proposed orders of judgment and on motion for judgment n.o.v.). Thus, as Judge Keeton later observed:

> [E]ven if I assume that there was an inconsistency between the general verdict and the jury's response to special interrogatory number 14, . . . I nevertheless conclude that the order for new trial should not be vacated. Plaintiff has made no showing that Judge McNaught abused his discretion by ordering a new trial in light of his concerns about the verdict apart from the inconsistency issue. In the absence of any showing that Judge McNaught's order for new trial was a clearly erroneous exercise of his discretion — taking into consideration *all* of his expressed reasons for ordering the new trial — the order for new trial will not be vacated, and plaintiff's motion for reconsideration will be denied.

Cool Light Co. v. *GTE Products Corp.*, No. 86-2668-K, at 4-5 (D. Mass. July 25, 1991) (memorandum and order) (citation omitted).

This inconsistency among the general verdicts also precludes Cool Light's argument that the trial court abused its discretion in failing to enter judgment on the special answer. While it is true that a trial court may enter judgment on the answer where there is an inconsistency between the general verdict and a special interrogatory answer,[5] there is no abuse

[5] Fed. R. Civ. P. 49(b); *Stoddard* v. *School Dist. No. 1*, 590 F.2d 829, 834 (10th Cir. 1979); *Nimnicht* v. *Dick Evans, Inc.*, 477 F.2d 133, 135 (5th Cir. 1973); *Elston* v. *Morgan*, 440 F.2d 47, 49 (7th Cir. 1971).

of discretion in failing to do so where the verdicts evidence either confusion or improperly duplicative awards.

We are mindful of plaintiff's Seventh Amendment concerns in vacating a jury verdict. Yet there exists no violation of Seventh Amendment rights where a trial judge exercises his lawful discretion in awarding a new trial where speculation and confusion are manifest in not only the verdict but the evidentiary record itself. *See Globe Liquor Co.* v. *San Roman*, 332 U.S. 571 (1948); *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940); *Kavanaugh* v. *Greenlee Tool Co.*, 944 F.2d 7, 10 (1st Cir. 1991); *MacQuarrie* v. *Howard Johnson Co.*, 877 F.2d 126, 131 (1st Cir. 1989) ("[t]rial courts have wide discretion when considering a motion for a new trial"); *Atlantic Tubing & Rubber Co.* v. *International Engraving Co.*, 528 F.2d 1272, 1276 (1st Cir. [1976]) (broad discretion to order new trial "encompasses the power to refuse to accept a jury's answers to special interrogatories."), *cert. denied*, 429 U.S. 817 (1976); 6A James W. Moore & Jo Desha Lucas, *Moore's Federal Practice* ¶ 59.04[2] (2d ed. 1991). A judge should not enter judgment on a verdict where it is impossible to understand the jury's intentions. To do so would make a mockery of the Seventh Amendment right of jury trial.

We fully recognize the disappointment to the plaintiff in what appeared to be a vindication of plaintiff's rights in the form of a multimillion dollar verdict. Yet, to obviate confusion and to improve upon significant evidentiary gaps, Cool Light was given a second trial before a highly competent and fair-minded judge. His thorough analysis in finding plaintiff's failure of proof is totally justified by the record. We are convinced from our own review of the record that Judge McNaught's grant of a new trial was not a miscarriage of justice. We find no abuse of discretion in his ruling.

Judgment affirmed.

CA #86-2668-Mc

Returned in open court
6-29-90 10:45 am
M.A. Robbins
Dep. Clerk

QUESTIONS TO BE ANSWERED BY THE JURY

1. Did Cool Light, through Mr. Panagiotou, disclose a trade secret of Cool Light to GTE?

   Yes X No _____

2. If your answer to Question #1 was "Yes", what was the trade secret that was disclosed?

   Combination of existing technology, through a unique manufacturing process to provide quality products that gave plaintiff a competitive advantage, in that time frame, in the STTV industry.

3. Did the defendant GTE, without permission, disclose Cool Light's trade secret to anyone else?

   Yes _____ No X

4. If your answer to Question #3 is "Yes", to whom was it disclosed without permission?

   _____

   _____

   _____

5. Did GTE use improper means to obtain a trade secret from Cool Light?

   Yes X No _____

6. Did GTE obtain confidential information from Mr. Panagiotou and then use it to advance its own business interests?

Yes _____ No X

7. If your answer to Question #6 is "Yes", what was the confidential information?

_____

_____

_____

8. Did Mr. Barkley pass along information to Mr. Panagiotou concerning coatings applied to reflectors by Liberty Mirror for Cool Light?

Yes X No _____

9. If your answer to Question #8 is "Yes", did Mr. Barkley transmit information which was the property of Liberty Mirror?

Yes X No _____

10. If your answer to Questions #8 and #9 are "Yes", did Mr. Barkley have the right to do so?

Yes _____ No X

11. Did anyone at GTE make a false representation of fact to Mr. Panagiotou?

Yes X No _____

12. If your answer to Question #11 is "Yes", what was that representation?

That GTE had the ability to produce, in volume, a quality product of dichroic coated reflectors per the specifications disclosed by Cool Light, Inc.

13. If you find GTE made a false representation, did Mr. Panagiotou rely on it, to his damage?

Yes X No _____

14. If Cool Light lost potential profits as a result of GTE's conduct, what was the amount of lost profits?

Nine million three hundred thousand dollars ($9,300,000.00)

15. If GTE made a profit of its own by reason of wrongful conduct toward Cool Light, what was the amount of that profit?

None ($)

16. Was there an agreement made by GTE with Cool Light?

Yes X No _____

17. If your answer to Question #16 is "Yes", was the agreement

In writing? Yes X No _____

Oral? Yes X No _____

Date: June 29, 1990

WILLIAM W. KOERNER
Foreperson

United States District Court
District of Massachusetts

Returned in
open court
6-29-90
M.A. Robbins
Dep. Clerk
10:45 am

VERDICT
Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.

v.

GTE PRODUCTS CORP.

COUNT ONE:
COMMON LAW-MISAPPROPRIATION OF A TRADE SECRET

WE, THE JURY, FIND for the defendant.

WILLIAM W. KOERNER	June 29, 1990
Foreperson's Signature	Date

United States District Court
District of Massachusetts

Returned in
open court
6-29-90
M.A. Robbins
Dep. Clerk
10:45 am

VERDICT
Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.

v.

GTE PRODUCTS CORP.

COUNT FOUR:
MASS. GEN. L c. 93, Sec. 42 —
"TAKING OF A TRADE SECRET"

WE, THE JURY, FIND for the defendant.

WILLIAM W. KOERNER	June 29, 1990
Foreperson's Signature	Date

United States District Court
District of Massachusetts

Returned in
open court
6-29-90
M.A. Robbins
Dep. Clerk
10:45 am

VERDICT
Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.

v.

GTE PRODUCTS CORP.

COUNT FIVE:
MISAPPROPRIATION OF INFORMATION

WE, THE JURY, FIND for the defendant.

WILLIAM W. KOERNER	June 29, 1990
Foreperson's Signature	Date

United States District Court
District of Massachusetts

Returned in
open court
6-29-90
M.A. Robbins
Dep. Clerk
10:45 am

VERDICT
Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.

v.

GTE PRODUCTS CORP.

COUNT SIX:
FRAUD

WE, THE JURY, FIND for the plaintiff, and assess damages in the sum of nine million four hundred fifty thousand dollars ($9,450,000.00).

WILLIAM W. KOERNER	June 29, 1990
Foreperson's Signature	Date

United States District Court
District of Massachusetts

Returned in
open court
6-29-90
M.A. Robbins
Dep. Clerk
10:45 am

VERDICT
Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.

v.

GTE PRODUCTS CORP.

COUNT ELEVEN:
CONTRACT

WE, THE JURY, FIND for the plaintiff, and assess damages in the sum of three million six hundred ninety four thousand dollars ($3,694,000.00).

WILLIAM W. KOERNER	June 29, 1990
Foreperson's Signature	Date

United States District Court
District of Massachusetts

Returned in
open court
6-29-90
M.A. Robbins
Dep. Clerk
10:45 am

VERDICT
Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.

v.

GTE PRODUCTS CORP.

COUNT TWELVE:
BREACH OF IMPLIED OBLIGATION OF GOOD FAITH

WE, THE JURY, FIND for the plaintiff, and assess damages in the sum of two million eight hundred thousand dollars ($2,800,000.00).

WILLIAM W. KOERNER	June 29, 1990
Foreperson's Signature	Date

United States District Court
District of Massachusetts

Returned in
open court
6-29-90
M.A. Robbins
Dep. Clerk
10:45 am

VERDICT
Case Number:
CA 86-2668-Mc

GTE PRODUCTS CORP.

v.

COOL LIGHT CO., INC.

WE, THE JURY, FIND for the defendant COOL LIGHT CO., INC.

WILLIAM W. KOERNER	June 29, 1990
Foreperson's Signature	Date

United States Court of Appeals
For the First Circuit

Civil Action
No. 86-2668-Mc

COOL LIGHT COMPANY, INC.

v.

GTE PRODUCTS CORPORATION

MEMORANDUM AND ORDER
ON
PROPOSED ORDERS OF JUDGMENT
AND ON
MOTION FOR JUDGMENT N.O.V.

August 9, 1990

McNaught, D.J.

This action was tried to a jury on certain counts of the complaint:

Count I for Misappropriation of Trade Secret. The jury returned a verdict for the defendant.

Count II under the California Uniform Trade Secrets Act. The jury returned a verdict for the defendant.

Count IV for Conversion of Trade Secrets under Mass. G.L. c. 93, § 42. The jury returned a verdict for the defendant.

Count V for Misappropriation under the Rest. Torts, § 759. The jury returned a verdict for the defendant.

Count VI for fraud. The jury returned a verdict for the plaintiff in the amount of $9,450,000. $2,950,000 was awarded by way of compensatory damages, and $6,500,000 as punitive damages under California law.

Count XI for breach of contract. The jury returned a verdict for the plaintiff in the amount of $3,694,000.

Count XII for breach of the implied obligation of good faith and fair dealing. The jury returned a verdict for the plaintiff in the amount of $2,800,000.

On the counterclaim filed by GTE Products Corporation, the jury returned a verdict for counterclaim defendant Cool Light.

The first question tackled at the hearing on August 2nd was the issue of whether pre-verdict interest should be awarded to the plaintiff who recovered on one contract count, one breach of the implied covenant of good faith, and one count of tort for fraud. After hearing argument, I answered the question in the affirmative and we moved on to a discussion of the difficult problems of the proper form of judgment and the disposition of the motion for judgment non obstante veredicto or a new trial.

The jury, in answer to interrogatory numbered 14, answered that the potential lost profits of Cool Light as a result of GTE's conduct, were $9,300,000. In the jury verdicts rendered, the plaintiff was awarded $9,450,000 on the fraud count (Count VI — $2,950,000 for lost profits and $6,500,000 as punitive damages); $3,694,000 in contract damages on Count XI, and $2,800,000 damages for breach of the implied covenant of fair dealing. Were the plaintiff to have execution satisfied on all these counts, the total amount of money recovered would be $9,444,000 (not $9,300,000).

I had instructed the jury that on the fraud count, and on the Count in tort for breach of the duty of fair dealing, compensatory damages could be awarded for "lost profits". Logically, it would seem that the jury would then assess the entire amount of lost profits on each of those counts. They did not. They awarded $2,950,000 for fraud and $2,800,000 for "unfair dealing". With respect to the contract count (on which they gave $3,694,000) they were granting money for lost profits and for any other expense incurred.

Ordinarily, one would, in these circumstances (if the award on each count duplicated an award for lost profits) figure that the plaintiff would be able to recover only the largest sum awarded — the $3,694,000 for breach of contract.

Plaintiff's counsel says: Not so. Mr. McCabe and Ms. Pittas contended that the jury could well have decided that a certain amount of lost profits was causally related to the breach of contract, a different amount of lost profits was causally related to the fraud, and a third amount of lost profits was related to the tortious conduct of bad faith dealing. All of those should be recoverable, they argued, and although they don't add up to $9,300,000, it may be that the jurors granted $144,000 by way of damages for expenses, etc., on the contract count.

It is the fact that if one subtracts $144,000 from $3,694,000, the remainder is $3,550,000. Add to the last figure the awards of $2,950,000 and $2,800,000 and the total is $9,300,000.

The argument is most appealing, but is based upon assumptions. First, one must assume that the jury actually determined that a particular amount of lost profit was "tied causally" to each of the three breaches of duty. And I have struggled in vain to come up with a sensible mode of determining how the jury would have struck upon different figures of $3,550,000, $2,950,000 and $2,800,000. It would have been easier (and more understandable) had the jury simply divided $9,300,000 by three and given $3,100,000 for list profits on each count. They did not do so.

Secondly, how do we know that the jury awarded $144,000 for items other than lost potential profits on the contract count? The jury didn't delineate what portion constituted lost profits and what constituted other damages. Mr. McCabe makes the assumption that $144,000 was for "other damages", but perhaps because it makes the mathematical computation possible. There's no evidence or basis in logic to support the assumption.

I have examined all of the options open to me. I have considered the possibility of granting a new trial on the issue of

damages only, but since Count VI asks in part for punitive damages under the law of California, if the jury finds that plaintiff is so entitled, it would have to hear *all* the evidence to assess the degree of culpability of defendant's conduct.

I considered granting judgment non obstante veredicto on one or more of the counts of the complaint which were given to the jury for determination, and decided against it, since, if a new trial is granted, new evidence might be offered. There is also the fact that even if I act in that fashion, we are still left to speculate concerning the award of damages, the source of the amounts decided upon by the jury, and the possibilities that the jury came up with inconsistent amounts, or amounts that were divided among the counts improperly.

In sum, one must speculate in order to assess the work of the jury. And that's wrong. If the plaintiff deserved a particular sum of money, he should not be required to be satisfied with a dollar less than that amount. Neither should he receive a dollar more than he deserves. On the present state of affairs, we don't know what he deserves.

There must be a new trial. Of that I am satisfied. It seems to me also that the new trial should be had on *all* the counts which were submitted for the jury's determination: not only on the counts where the jury found in plaintiff's favor, but on those counts where the jury decided against him. We cannot know for the moment precisely what evidence will be offered and admitted at a new trial. If, in fact, there is admissible evidence which makes a different impression on the jurors' minds, plaintiff may (be entitled to and may) prevail on one or more of the counts on which this past jury decided adversely to him.

It is ordered that a new trial be had on all of the counts which were submitted to the jury: I, II, IV, V, VI, XI, XII and the counterclaim.

s/ JOHN J. McNAUGHT

JOHN J. McNAUGHT
United States District Judge

United States District Court
For the District of Massachusetts

Civil Action No. 82-2668-Mc
BBO #327040
BBO #552245
BBO #400780

COOL LIGHT COMPANY, INC.,
PLAINTIFF,

v.

GTE PRODUCTS CORPORATION,
DEFENDANT.

PLAINTIFF'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR REDUCTION IN AMOUNT OF COMPENSATORY DAMAGES

Plaintiff, Cool Light Company, Inc. ("Cool Light"), hereby moves for reconsideration of this Court's Memorandum and Order on Proposed Orders of Judgment and on Motion for Judgment N.O.V. dated August 9, 1990. In support of its Motion, Cool Light relies on the unanimous jury verdict of June 29, 1990, the jury's answers to specific Interrogatories

propounded by the Court and the accompanying statement of points and authorities.

EDWIN A. MCCABE/
SUZANNE MACPHERSON

EDWIN A. MCCABE
SUZANNE E. MACPHERSON
MCCABE & ASSOCIATES
1111 Beacon Street
Brookline, MA 02146

SYDELLE PITTAS

SYDELLE PITTAS
GASTON & SNOW
One Federal Street
Boston, MA 02110

DATED: August 20, 1990

Aug. 29, 1990
Denied.
McNaught, DJ

United States District Court
District of Massachusetts

CIVIL ACTION
NO. 86-2668

COOL LIGHT COMPANY, INC.,
A CALIFORNIA CORPORATION;
PLAINTIFF,

v.

GTE PRODUCTS CORPORATION,
A DELAWARE CORPORATION;
DEFENDANT.

MOTION FOR JNOV;
HEARING RE: FORM OF JUDGMENT

BEFORE THE HONORABLE JOHN J. McNAUGHT
United States District Judge

Courtroom 12
U.S.P.O. & Courthouse
Boston, Mass.
Thursday, August 2, 1990

APPEARANCES:

For the Plaintiff:
McCABE & ASSOCIATES
EDWIN A. McCABE, ESQ.
1111 Beacon Street
P.O. Box 3387
Boston, MA 02101

Now when we go to Count 12 on which they also gave a recovery, here is where the puzzlement comes. I said to them in Count 12, is there was an evasion of the spirit of the bargain of a contract, if they found that, then I said, they should award damages for whatever flowed naturally from that breach. And they come up with a figure less than $2,950,000. They come up with two million eight, which to me is very difficult to understand. And I honestly don't know of what that two million eight consists, unless there is some portion of the profit that they felt wasn't available to the plaintiff in the event of a recovery.

In other words, I would anticipate on the instructions that I gave to the jury that if you gave damages in Count 12, Count 11 and Count 6, other than punitive, every one of them should have included lost profits through 1990. Now, whether I instructed them that clearly or not, I can't judge, because I sit up here and they sit down there. But this is the type of help that I need from you people. Do you follw me? I've got to be instructed on — I have one viewpoint; the jury may have a totally different one in the light of what I said. I might have said something that they interpreted differently than what I meant to say. Okay?

So I would like you people to teach me a lesson as to what the jury actually did in this case. In a way, I almost was tempted when they returned the verdict to stop them and make them answer more questions. And I said no, I can't do that. That is not the function of a Judge. It's the function of the lawyers to make me do things of that sort. But I cannot spontaneously order a jury to do something like that.

So now why don't we start again on this aspect of it, if you don't mind. We are holding the motion for JNOV until last, all right?

MR. DONELAN: Yes, your Honor.

THE COURT: But let's consider that I have denied the defendant's motion to enter a judgment without preverdict interest, because it is my honest opinion that if a verdict is

rendered in favor of a plaintiff in a case of this nature with the causes of action on which the jury returned the verdict, that they are, in the light of the instructions that I gave, which are different from Judge Keeton's case, and different, as a matter of fact, in the causes of action a little bit. But I don't think that there is anything wrong with preverdict interest being rendered in a case of this nature.

Now, will the front table tell me their opinion on my random thoughts with respect to these counts? All right?

MR. McCABE: May I start off by explaining, if it's necessary, why I laughed at one point while you were speaking. And Ms. Pittas leaned over to me and said, "You

United States Court of Appeals
For the First Circuit

No. 92-1082

COOL LIGHT COMPANY, INC.,
PLAINTIFF, APPELLANT,

v.

GTE PRODUCTS CORPORATION,
DEFENDANT, APPELLEE.

Before

BREYER, *Chief Judge*,
LAY,* *Senior Circuit Judge*,
TORRUELLA, O'SCANNLAIN,** SELYA, CYR,
BOUDIN and STAHL, *Circuit Judges*.

ORDER OF COURT

Entered: October 15, 1992

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

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*Of the Eighth Circuit, sitting by designation.
**Of the Ninth Circuit, sitting by designation.

[cc: Messrs. McCabe and Van Gestel]

United States District Court
District of Massachusetts

CIVIL ACTION
NO. 86-2668

COOL LIGHT COMPANY, INC.,
A CALIFORNIA CORPORATION;
PLAINTIFF,

v.

GTE PRODUCTS CORPORATION,
A DELAWARE CORPORATION;
DEFENDANT.

TWENTY-FIFTH DAY OF CIVIL JURY TRIAL VERDICT

BEFORE THE HONORABLE JOHN J. McNAUGHT
United States District Judge

Courtroom 12
U.S.P.O. & Courthouse
Boston, Mass.
Friday, June 29, 1990

APPEARANCES:

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(Appearances continued.)

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(10:30 a.m.)

THE COURT: We have a writing to the effect that they have reached a verdict.

After I read the answers to the questions on the general verdict, I'm going to send the jury back out in case there is any discussion that we have to have before we retire. Okay?

(Pause)

(Jury present in courtroom.)

THE CLERK: Mr. Foreman, has the jury agreed upon its verdict?

THE FOREMAN: Yes, we have.

(Verdict handed to the clerk, who hands it to the Court.)

THE COURT: Why don't you sit down for a moment because I have to read them.

(Pause)

THE COURT: I can see right off the bat that I have to give you another question.

(Pause)

THE COURT: I'm going to read these at any rate, and then I'm going to put the question to you. The question, you may be thinking, is whether or not within the amount of money that you have awarded on Count 6 for fraud, you included

punitive damages. I'm going to have to ask how much of that was for punitive damages, if anything. So you can be thinking of that question as we go along.

But I'm going to read these for the edification of the counsel and the parties.

Mary, do you mind if I take your job away from you in this regard?

THE CLERK: Not at all, Judge.

THE COURT: I'm going to ask you after each each [sic] one whether or not I read answered the answer correctly, Mr. Foreman. Okay?

"Question No. 1, Did Cool Light, through Mr. Panagiotou, disclose a trade secret of Cool Light to GTE?"

Your answer was, "Yes."

Correct?

"Question No.2, If your answer to Question No. 1 was 'Yes', what was the trade secret that was disclosed?"

And your answer was, Combination of existing technology through a unique manufacturing process to provide quality products that gave plaintiff a competitive advantage in that time frame in the STTV industry."

Correct?

"Question No. 3, Did defendant GTE, without permission, disclose Cool Light's trade secret to anyone else?"

Your answer is, "No."

Correct?

Question No. 4, then, requires no answer.

"Question No. 5, Did GTE use improper means to obtain a trade secret from Cool Light?"

Your answer is, "Yes."

Correct?

"Question No. 6, Did GTE obtain confidential information from Mr. Panagiotou and then use it to advance its own business interests?"

Your answer is, "No."

Correct?

That means that Question No. 7 need not be answered.

"Question No. 8, Did Mr. Barkley pass along information to Mr. Panagiotou concerning coatings applied to reflectors by Liberty Mirror for Cool Light?"

The answer is, "Yes."

"Question No. Nine, If your answer to Question No. 8 is 'Yes', did Mr. Barkley transmit information which was the property of Liberty Mirror?"

Your answer is, "Yes."

"Question No. 10, If answer to Questions No. 8 and No. 9 are 'Yes', did Mr. Barkley have the right to do so?"

Your answer is, "No."

Correct?

"Question No. 11, Did anyone at GTE make a false representation of fact to Mr. Panagiotou?"

Your answer is, "Yes."

"Question No. 12, If your answer to Question No. 11 is 'Yes', what was that representation?"

And your answer is that GTE had the ability to produce in volume a quality product of dichroic coated reflectors for the specifications disclosed by Cool Light, Inc.?

Did I read it correctly?

"Question No. 13, if you find GTE made a false representation, did Mr. Panagiotou rely on it, to his damage?"

Your answer is, "Yes."

"Question No. 14, If Cool Light lost potential profits as a result of GTE's conduct, what was the amount of lost profits?"

Your answer is, "$9,300,000."

Did I read your answer correctly?

"Question No. 15, If GTE made a profit of its own by reason of wrongful conduct toward Cool Light, what was the amount of that profit?"

Your answer is, "None."

"Question No. 16, Was there an agreement made by GTE with Cool Light?"

Your answer is, "Yes."

"Question No. 17, If your your answer to Question No. 16 is 'Yes', was the agreement in writing?"

Your answer is, "Yes."

"Was there an agreement, oral?"

Your answer is, "Yes."

And you signed it, Mr. Foreman, on June 29, 1990.

Did I read those correctly?

THE FOREMAN: Yes.

THE COURT: Now, for your general verdict slips. On the counterclaim by GTE against Cool Light, you find in favor of Cool Light.

Do I recite that correctly?

Hold on for just a minute.

(Pause)

THE COURT: On Count No. 1 for misappropriation of a trade secret at common law, you find for the defendant.

Correct?

On Count No. 4, for taking of a trade secret, under General Laws, Chapter 93, Section 42, you find for the defendant.

Correct?

On Count No. 5, for misappropriation of information, you found for the defendant.

Correct?

On Count No. 6, for fraud, you assess damages in the — you find for the plaintiff and assess damages in the amount of nine million four hundred thousand — four hundred-fifty thousand dollars, I'm sorry.

I think I know what the answer is going to be to the question that I put to you. But I'm going to put it to you and ask you to respond to it in writing, anyway.

Count No. 11, for contract, you found for the plaintiff and assessed damages in the sum of three million six hundred thousand — six hundred ninety-four thousand dollars.

Did I read that correctly?

On Count 12, for breach of implied obligation of good faith, you found for the plaintiff and assess the damages in the sum of $2,800,000.

Did I read that correctly?

I will ask each member of the jury now, before I send you back in to the deliberation room, whether you agreed to these questions and these verdicts prior to coming into the courtroom. I will ask each juror by number. And if you will simply respond yes, if you agreed, no, if you never did agree to it, I would appreciate it.

Juror No. 1?

THE JUROR: Yes.

THE COURT: Juror 2?

THE JUROR: Yes.

THE COURT: Juror 3?

THE JUROR: Yes.

THE COURT: Juror 4?

THE JUROR: Yes.

THE COURT: Juror 5?

THE JUROR: Yes.

THE COURT: Juror 6?

THE JUROR: Yes.

THE COURT: Juror 7?

THE JUROR: Yes.

THE COURT: Juror 8?

THE JUROR: Yes.

THE COURT: Juror 9?

THE JUROR: Yes.

THE COURT: Juror 10?

THE JUROR: Yes.

THE COURT: I thank you very much. I would ask you if you would kindly retire, I have to discuss matters with the attorneys. And it's my intention to ask you whether, in the sum that you granted on Count 6, you included punitive damages. And if so, to what amount. Okay?

Thank very much. Would you retire?

(The Jury exists the courtroom.)

THE COURT: Please be seated.

Mr. McCabe, advice to the Court? Anything you want to put on the record?

MR. McCABE: I don't believe so, your Honor.

THE COURT: All right.

Back table, advice you wish to give to the Court?

MR. DONELAN: None, your Honor.

THE COURT: Then I will bring the jurors back. May I ask them verbally as to whether or not they assessed punitive damages, and if so in what amount? Any objection to it? Or do you need it in writing?

MR. DONELAN: No.

THE COURT: And I'm assuming that that is a part of the verdict which was returned on Count 6, do I have the number correctly?

MR. McCABE: Yes.

THE COURT: Mary, I'm going to leave it to you, since you are the clerk, would you ask the jurors whether or not they could respond verbally to my question that I put to them? Would you go to the jury room and ask them if they can answer me in person, through the foreperson, whether or not they assess the punitive damages and in what amount.

THE CLERK: And in what count?

THE COURT: The count is 6, for fraud.

They can come back in, if they can answer it. If they can't, then we want them to deliberate on it.

THE CLERK: Yes, Judge.

THE COURT: They can. Okay, bring them back in. Mary, please.

THE COURT: After we receive their verdict, I'm going to ask them to retire in my chambers for the time being. And I will give you my own findings on the equity counts.

MR. McCABE: Thank you, your Honor.

(Jury present in courtroom.)

THE COURT: Mr. Foreperson, are you prepared to answer the question of the Court?

THE FOREMAN: I am, your Honor.

THE COURT: Did you find punitive damage on any count?

THE FOREMAN: That part is $6,500,000.

THE COURT: So the punitive damages assessed were in the amount of $6,500,000?

THE FOREMAN: Correct.

THE COURT: Am I correct when I say that you awarded that on Count 6?

THE FOREMAN: Correct?

THE COURT: Which was the count for fraud.

THE COURT: And that If I subtract $6,500,000 from $9,450,000, I will have what you consider to be the amount for compensatory damages for the fraud.

Will you do the arithmetic along with me because I'm not too good at this.

THE COURT: If I've got it correctly, you assessed as compensatory damages $2,950,000? Did I get it correctly? Do I see all heads nodding in the jury?

THE JURY: Yes.

THE COURT: I ask permission of counsel to send the jury in to my chambers while I make my own findings on the equity matters. Fair enough?

Would you folks be kind enough to go into my law library? And would the law clerk set them up with a sufficiency of chairs so that they can all relax.

(Jury enter Judge's law library.)

THE COURT: Did you hear what the clerk just said? You will prepare a form of judgment.

MR. McCABE: We will, your Honor.

THE COURT: Please, seated.

Obviously, this is not the first time that I have been involved in cases where certain of the matters are to be decided by the Court. It always happens, for example, in ° a 93(a) case. And other matters are decided by jurors by reason of the nature of the claims that have been brought. I have determined, and I have expressed to you people, in the light of experience which I've had in the past, that I would

not accept the findings of fact from jurors in a complicated case of this nature. I wouldn't do it in this, and I would never again do it in a case involving an antitrust. The reason being that I am entrusted with the job of determining what is, if there is a finding for a plaintiff, what is the proper order to be entered on the equity side of the Court which may or may not include the assessment of damages.

I figure in the 18 years that I have had sitting on the bench, listening to witnesses and studying legal issues in a case, makes a judge particularly qualified to decide facts of the equity side of the Court. And to tell you in a nutshell, what I have done here, I'm going to order judgment for the defendant on those counts which were properly decided by the Court, Counts 3, 7, 8, 9 and 10, since I do not find the predicate facts required as a basis for a plaintiff's recovery.

In this case, Cool Light based its case on alleged conduct and misconduct of GTE which they say was in violation of the laws's rudimentary requirements of good faith. I think I'm quoting somebody when I say that. If there was a lack of good faith in this case, in my opinion, the lack of good faith was best characterized by Mr. Barkley. Mr. Barkley told us about his treatment of his former employer. If in fact he told us the truth about his alliance with Mr. Panagiotou. To say that I was disappointed with the man and the manner in which he answered questions is putting it lightly. I intimated the other day that I didn't believe Mr. Barkley, and I certainly did not.

At any rate, all that I have to determine is that I was not persuaded by the testimony of Mr. Barkley that he worked together with Mr. Panagiotou to put together a business or trade secret, the so-called method of cooking chemicals on the substrates to provide a novel lighting system which would enjoy success in the STTV market.

I'm sorry, Mr. Panagiotou, but I didn't believe you, either.

Mr. Barkley was an employee of Liberty Mirror. There was other testimony in this case which I did accept from the former chief officer of Liberty Mirror to the effect that any

development which was worked out by Barkley or any other employee in research and development belonged to the employer. I believe that. And I believe that if Mr. Barkley did pass on anything, which I do not believe, he had no right to do it. It was Liberty Mirror's. It was not his to dispose of it.

Mr. Panagiotou would have no right to any secret, if in fact there was a secret which came from Liberty Mirror. And he who seeks equity must do equity, which was not the case here.

At any rate, I'm not satisfied that there was a secret at all.

Mr. Panagiotou, in my opinion, described for other people what type of product he wanted, a product which was known in the trade for decades. And other people made it, people including Liberty Mirror, William Granier, Optochrome and GTE.

The plaintiff's lawyers, on Page 2 of a memorandum supplied to me in support of the equity claims in this case, said that they passed along information to GTE which had to do with the technology involved and the so-called know-how. And I think those were the phrases that they used. Technology and know-how.

I didn't hear any persuasive evidence of any transfer or transmittal of technology and know-how in a form that I could really put my hands on from Cool Light to GTE. It's my opinion, and I conclude as fact, by reason of the evidence that I have heard, that GTE exerted their best efforts to manufacture something as requested by Mr. Panagiotou without any scientific assistance from him.

Part of my reasoning in that regard has to do with the fact that the combination of the silicon dioxide and titanium dioxide was no secret at all. GTE and other persons had been making dichroic coatings of similar materials and placing them on reflectors for a long period of time.

Indeed, the patents which were offered in evidence here disclosed the use of zinc sulfide, lead sulfide — chloride, thallium iodide, silica, quartz and titanium dioxide. If I look at the Koch patent alone, if I pronounce the name correctly,

which is numbered 2552184, which was filed on *June 2nd*, 1950, we find an example of the use of titanium dioxide of which much was made in the evidence.

Secondly, I must state frankly that I was not persuaded by plaintiff's expert, Mr. Smith, concerning alleged lost profits of Cool Light. I take into account the fact that there were actual rentals over the pertinent years here. And they show that entirely apart from the claim made by Cool Light, Cool Light would not have enjoyed the success which was claimed. In one instance, it seems to me I recall somebody saying that they'd have 60 percent of the market by 1987.

In my opinion, the incandescent light, such as Cool Light, would have been put out by HMI. I find no binding contract between Cool Light and GTE who are the parties here.

In my opinion, Mr. Panagiotou, if he was entitled to them, could have obtained reflectors if he had had the desire, the finances and the market, from Optochrome and other manufacturers. It seems to me that lack of money and a lack of market was what really dimmed Cool Light's prospects.

Neither was there any binding oral agreement, other than the statement by GTE that if a purchaser asked for Cool Light's product, a negative response would be forthcoming. If, however, somebody asked that an identical product be processed, without indication that they were seeking to duplicate Cool Light's product as such, then GTE was free to fill the order.

I find that that was the only representation which was made. I conclude that there was no fiduciary duty resting on the defendant at all. No acceptance of responsibility for maintaining secrecy about anything. So judgment has to enter for the defendant on my findings on Count 3.

Since I find no unjust enrichments of GTE at the expense of Cool Light, defendant must also have favor in — judgment in its favor on Count 7.

I can't find any constructive trust in this case. So I order judgment for the defendant on Count 8.

And on the 93(a) count, I find no conduct on the part of GTE which, to quote Mr. Justice Cass of the Massachusetts Appeals Court, and I do quote, "rises to the level of rascality which would raise the eyebrows of someone enured to the rough and tumbled world upon us."

I would not find that GTE used Mr. Panagiotou's technology and know-how to the detriment of Mr. Panagiotou. I would find that they refused to deal with a person who wouldn't pay his bills or couldn't pay his bills.

If I'm required to do so, I would find for the defendant on Count 10, which is the so-called California counterpart of Massachusetts General Laws, Chapter 93(a). And with respect to the so-called potential damages, if in fact they had found damages, on the so-called fraud count, would I find no malice, no oppression and indeed no fraud under either Massachusetts law or the California Civil Code, Section 3294.

Those are my findings. And I shall enter a judgment for the defendant on all of those counts.

Now, I offer to counsel in the case an opportunity to, if they wish, you don't have to, speak to the jury, about your performance in the case, not about their deliberations. I leave it up to counsel. Mr. McCabe, would you like to speak with the jurors?

MR. McCABE: Yes, your Honor.

THE COURT: Back table, would you like to speak to the jurors about your performance?

MR. DONELAN: I speak only for myself, no thank you.

THE COURT: No thank you.

Would you bring the jurors in? We'll let Mr. McCabe talk to the jurors about his own performance in the case.

MS. PITTAS: May I, as well?

THE COURT: You may.

(Jury present in courtroom.)

THE COURT: Please, sit down.

On the record, Mr. Foreman, members of the jury, we have a case entitled United States versus Kepreos which sounds like

it only applies on the criminal side of the Court. But our Court of Appeals has also enunciated a proposition that what they said in United States versus Kepreos applies also on the civil side.

Lawyers are not allowed to talk to jurors after a case is over about their deliberations. That is nothing to do for anybody who is associated with the Massachusetts Court, because in a case of Commonwealth versus Fidler, the Supreme Judicial Court of Massachusetts came down with the same proposition. Lawyers should not talk to jurors after a case is over about their deliberations. Now, there is a strange thing about this. Up to the present time, at least, there has been no pronouncement to the effect that jurors may not talk to lawyers. That is strange, but the converse has never been said. At any rate, it would be a violation of the ethical duty of these lawyers to try to talk to you about what you have done in the course of your deliberations.

Even before Commonwealth versus Fidler and the United States versus Kepreos, judges of the Massachusetts Courts, after jury trials, many times spoke to the jurors and urged upon them that they maintain restraint in that regard, that they should not talk about their deliberations for a number of reasons.

First of all, you may not, by way of your own conversation outside negate what was done in that jury room. You will not be heard to do so. If there was an outside influence which was exerted upon the jury as a whole or any individual juror, that is something else, of course. That is something that could be inquired into. But not your deliberations. Because you may not nullify what you have done as a jury, one of you doing that independently outside the Court.

Secondly, if you talk after your jury deliberations are over about the deliberations that you have had, and those deliberations become, of what went on in the jury room becomes publicly known, that discourages other jurors in the future. They say, here I am, I'm going to go into that juryroom, and I

depend upon my fellows and my sisters inside there for secrecy. If I'm not going to be able to depend upon that secrecy, then I don't want to take part in the negotiations by speaking my peace. So it could discourage future jurors from taking freely, part in deliberations which occur.

So for those and some other reasons, we always urge that jurors should not talk about their deliberations. On the other hand, I have always said that lawyers can be educated about what they have done right and what they have done wrong. And if any lawyer who tries a case before me wants to speak to the jurors about what kind of job they did and what constructive suggestions the jurors might have for their future conduct, I would let them talk to the jurors.

I have a lawyer who used to appear before me quite frequent like while I was on the state Court. He had an awful habit and he wasn't aware of the fact that he had it. He's be arguing to a jury and all of a sudden he'd want to think of a point and his mind would go blank, and he'd turn his back on the jurors. And his backside wasn't so pretty to the jurors and they'd let me know that at a later time, that they didn't like the habit of this lawyer turning his back to the jury box. That is just one example. Another is, some lawyers, for crying out loud, block your view of the witness all the time. That is a bad thing for a lawyer to do, too.

So Mr. McCabe, would like to get some free education about what did he wrong in this case.

Ms. Pittas, I told you you didn't do anything wrong. But she wants to talk to you, too. So I'm going to let them have a conversation with you, not to exceed a period of ten minutes. You do not have to answer Mr. McCabe's or Ms. Pittas' questions, but if you would they would certainly appreciate it. And of course I'm giving grades which we are going to send back to their law schools.

Mr. McCabe, you're free to ask the jury a question.

MR. McCABE: Well, a couple of things. First of all I'm not going to ask you to pass judgment on my backside, I

promise you that. I'm willing to put a great deal of faith in the jury system, but there are limits to it.

Second of all, obviously, I want to say thank you, as I did before, for the work you did. Not the result, that is not the most important thing here. The important thing here is that the faith of a lot of people in the jury system, I think, is put at test every time we appear before a jury, and you have very much kept the faith with us. And again, I believe I speak for everybody when I say that.

Yes, I think both Ms. Pittas and I would be very, very interested in your comments on the presentation that we made and how we did it and any comments you might have. You don't have an awful lot of questions for some pretty interesting witnesses that we put on, do you have anything you'd like to tell us?

THE FOREMAN: I'd like to make one comment, and that is the only time I have seen a jury trial is in that 19-inch tube at home. And everybody, from the lawyer to the witnesses, to the criminals, I forgot how perfect they are. And then I come in here and face you people, and you're not perfect. And that —

THE COURT: You're the first one who ever told them that.

(Laughter)

MR. McCABE: Outside of the domestics setting.

THE FOREMAN: That made me realize that everybody is human, even the lawyers. Okay. So overall my own opinion is I have no comments. I think it was, the presentation was fine. Certainly nothing that I can think of to criticize. Other than, I'm glad I did it.

THE COURT: Can I pick on you, Mr. McCabe?

MR. McCABE: Most assuredly.

THE COURT: Every once in awhile you swallow the end of a sentence when you ask a question. And I don't get the end of question. But I bank upon the witness when they give me the answer to let me know if they had any failure in that regard. And none of them did it. So I assume it's my, maybe my hearing rather than your speaking.

MR. McCABE: No, again, outside of the domestic setting, I haven't had a lot of criticism in that regard. But within the domestic setting, a fair amount.

THE COURT: You've been told that you swallow your words a lot.

MR. McCABE: Yes, It is, unfortunately, a McCabe characteristic is to mumble at times. It goes back generations, I'm told.

THE FOREMAN: There was one other thing. Every once in awhile, we wanted to take the rubber band away from you.

(Laughter)

MR. McCABE: I mean, you know, you take that away and I would have been silent up there.

(Laughter).

MS. PITTAS: There was one day when I didn't think he was going to be able to get up and do what he had to do. He couldn't find a rubber band, and took it off a pile of my documents.

THE COURT: Anybody else who would like to — how about Ms. Pittas, would you like to say anything about the outfits that she wore?

(Laughter).

THE COURT: You do dress very well, I must say. Anybody got any suggestions for Ms. Pittas? I have no trouble hearing you at all. Your voice carries easily up here. And I assume it did with the jurors, also. You didn't have any trouble with her questions? Any suggestions that you have for her? Did she at any time stand between the witness and yourself?

Many years ago, I conducted what was called experimental session in Salem. And I handed out a hundred questionnaires to jurors every month over the year. So I had 1200 answers to questionnaires. And it's strange, the answers that came back from the jurors about things on the part of lawyers that they didn't like. Sometimes they would mention the lawyers' names. They did not like it when a lawyer was arguing to them if the lawyer went over and put his or her hands on the

jury rail. They didn't like that at all. They felt that that was an invasion of their territory.

THE FOREMAN: Could I make one general comment?

THE COURT: Sure.

THE FOREMAN: And that is if you had a book with some pictures in it of the witnesses, and I would think in any trial, that would be extremely helpful for the jurors so that they could remember who said what, to have pictures. I don't know whether the witnesses would like the idea, but it certainly would be helpful.

MS. PALMIERI: Yes, I had done that because I was a law clerk to a Federal Judge and at the time, I saw —

THE COURT: Don't tell them to whom, Annie.

MS. PALMIERI: I won't.

And I saw that, you know, they used a photo album and they put their witnesses in it. And did it help in a long trial. But we didn't put, we didn't ask the other side if we could do it, if it could go into the jury room. And as a result, it sat on that desk over there.

THE COURT: I think that is a good idea. Everybody ought to keep it in mind.

What do you say now, we can't let Ms. Pittas go out of here without one suggestion for which she might prove herself. Anyone in the back row?

THE JUROR: Well, her nickname was Miss Perkie.

(Laughter).

THE JUROR: Not by me.

MS. PITTAS: I'm dead. I'm dead.

MR. McCABE: That is one prayer brought to an end.

THE FOREMAN: My wife always said, "Kill them with kindness." And you do that.

THE COURT: I guess that is it, folks. They have no criticism to give of you.

MS. PITTAS: I would like to say thank you.

THE COURT: I'm going to ask the jurors to come into my chambers and have coffee. We'll gab for a little while, if you

don't mind. That man who is coming to see me, is he already here?

THE CLERK: I don't know.

THE COURT: We'll see the jurors in the chambers, in the library? Then may we be at a close. If the jurors would come inside, please?

(Jury enters Judge's chambers.).

THE COURT: Thank you for all your help.

(Whereupon, the above-entitled matter was adjourned.)

United States District Court
District of Massachusetts

CIVIL ACTION
NO. 86-2668-K

COOL LIGHT CO., INC.,
PLAINTIFF,

v.

GTE PRODUCTS CORP.,
DEFENDANT

OPINION
December 11, 1991

KEETON, *District Judge.*

This state common law action was tried to the bench (McNaught, J.) and jury in May and June 1990. The jury found for the plaintiff on each of the counts tried to it, and the judge found for defendants on all counts tried to the bench. On August 9, 1990, the court (McNaught, J.) ordered that a new trial be held on the jury counts. By later stipulation of the parties, only counts VI (fraud), XI (breach of contract), and XII (breach of implied covenant of good faith and fair dealing), and defendant's counterclaim were retried to the bench (Keeton, J.) in October 1991; the other counts originally tried to the jury were waived. On October 31, 1991, at the conclusion of the bench trial, the court announced its findings and conclusions, and ruled that judgment must be entered for defendant on each of claims VI, XI, and XII, and that judgment must be entered for plaintiff on defendant's counterclaim.

The parties have requested further findings of fact and rulings of law, and the plaintiff has requested that the court's findings and conclusions of October 31, 1991 be vacated as erroneous. After review of the evidence and after consideration of the submissions of the parties, including Defendant's Proposed Findings of Fact and Rulings of Law (Revised) (Docket No. 220, filed November 20, 1991), Plaintiff's Revised Proposed Findings of Fact and Rulings of Law (Docket No. 221, filed November 21, 1991), Plaintiff's Response to the Revised Proposed Findings of Fact and Rulings of Law of the Defendant (Docket No. 224, filed November 29, 1991), and Defendant's Response to Plaintiff's Revised Proposed Findings of Fact and Rulings of Law (Docket No. 223, filed November 27, 1991), I now deny plaintiff's request to vacate any findings and conclusions of October 31, 1991. Additional findings of fact and conclusions of law are stated in this Opinion. I deliberately do not address all requests, however. Both parties to some extent, and plaintiff to much greater extent, have requested numerous detailed findings on matters not directly relevant to any dispositive matter in this case. It is not the court's function to make findings on disputes that could in no event affect the outcome of the case.

I. Background

In the 1970's, George Panagiotou began collaborating with Arthur Bodkins in Winthrop, Massachusetts to produce a lighting system that would be cooler to work under than then available lights. The cooler lights were based upon a design that allows visible light from a lamp to be reflected forward while a portion of the heat-intensive infrared rays are transmitted through the back of the light. By 1976, Panagiotou had decided to take the cool lighting idea to Hollywood to benefit from the concentrated market for such lights he hoped to find there, and in 1977, the Cool Light Co. ("Cool Light" or "the company") was incorporated.

The company began in a small plant where lights were assembled by hand. Each light consisted of a fixture, a lamp, and a coated reflector. The lamps used in the Cool Light lights were standard tungsten-halogen lamps readily available at all relevant times. The Cool Light fixtures were also industry standard at first, although Panagiotou made improvements to the fixtures over the course of time. Cool Light had multiple fixtures, including so-called single handis, nine-lights, and, by 1981, 2K lights. The Cool Light fixtures were more "user-friendly" and accessible than those available from other sources in the market place, and were more economical to use.

The reflectors, however, are what made the Cool Light lights special. In the beginning, the company's source of supply of reflectors was the Liberty Mirror division of Libby-Owens-Ford Corporation, and a man who worked there, Dwight Barkley. In 1978, Panagiotou was approached by a representative of defendant GTE Products Corp. ("GTE"), William Staubitz, who urged Panagiotou to enter a relationship with GTE for the purpose of obtaining the necessary reflectors for Cool Light. A meeting was arranged among Panagiotou, Staubitz, and another executive of GTE, Henry Hidler, which took place at Logan Airport in the fall of 1978. A second meeting took place later at GTE's coating facility in Massachusetts as Panagiotou explored the ability of GTE to make the necessary coated reflectors.

Eventually, Cool Light and GTE began working together to try to make reflectors for Cool Light's lights. At first, GTE had a difficult time trying to produce reflectors that satisfied Panagiotou, but by September of 1980 enough progress had been made that Cool Light placed its first purchase order. After what had been a long uphill climb to reach that stage, there then followed a rapid decline in the business relationship between Cool Light and GTE. Although two additional purchase orders were placed, Cool Light received few reflectors that were satisfactory to Panagiotou. At the same time, Cool Light began falling behind in its payments to creditors, in-

cluding GTE. The business relationship quickly soured; Panagiotou was unable to pay his existing trade debts without reflectors he needed to make his product and GTE was unwilling to provide more reflectors without payment on pre-existing debts. In the end, Cool Light sold off much of its stock to pay creditors and quickly ceased doing any active business.

II. Causation: The Market

Each of the parties has made requests for subsidiary findings. In the case of Cool Light, the request is for findings both subsidiary and contrary to my announced findings. Before addressing each of the claims now at issue, I state my overriding finding, dispositive of all of plaintiff's claims before me. This finding was announced orally on October 31, 1991, but it bears repeating here.

> Now, on the causation issue in this case, I am aware that I have before me a lot of quite conflicting evidence with respect to the characteristics and the performance of Cool Light compared with various other products that might compete with it in the marketplace; the FAY lights, the HMI, anything else that might come into the marketplace. And counsel spoke in the course of the argument about wondering about the court's expertise in sitting here and evaluating how the different products would work in the marketplace. Well, I share that concern, and so the overwhelming evidence for me is not the testimony of the witnesses on one side or the other with respect to this conflict about what are the characteristics of this product in comparison with others that will be competing with it in the marketplace, but what does the marketplace tell us, what does the marketplace tell us.
>
> The most overwhelming evidence before me is the evidence, partly direct but more circumstantial evidence, that here we are in 1991. I'm being asked to find that

> the characteristics of the Cool Lights are such that but for the absence of the production by GTE of [reflectors] that met the expectations they were aiming for, both parties were aiming for, but for that, Cool Light would now have a major percent of the market and would have had a major percent of the market in the meanwhile. Now, I cannot find that contention credible. There are a number of different ways of looking at it.
>
> The ultimate way of looking at it is the market tells me otherwise, because Cool Lights do not have a significant position in the market at this moment. And if they were valued by the decision makers in the market as the plaintiff asks me to value them here after hearing evidence about the characteristics and so forth, if they were valued by decision makers in the market in that same way that I am being asked to say they are valued, they would have a place in the market today, if not Cool Lights themselves, another product very much like them, because of course if it can be developed by one group, it can be developed by another group. And so if they were as good as [plaintiff's expert's] premises assumed, the marketplace would look different today. Because of the evidence before me as to what the marketplace does show, that is the most probative, the weightiest evidence that I as fact finder credit in determining as a fact [t]hat even if I assume that the particularity and specificity requirements were satisfied, I still must decide for the defendant on each of the plaintiff's claims because of the requirement of showing that the false representation or the breach of contract or the breach of the obligation of good faith was a cause of the harm that is being alleged. I cannot make that finding. The marketplace tells me otherwise.

Transcript V-72 — V-74. In the event that my findings regarding causation and the marketplace should be questioned,

I make the following additional findings and conclusions in the interests of judicial economy.

III. Breach of Contract (Count XI)

The parties agree that in order to prevail on its claim for breach of contract in this action, Cool Light must show: (1) that an agreement was made between the plaintiff and the defendant, (2) that the agreement is supported by valid consideration, (3) that the plaintiff has performed or was ready, willing, and able to perform, (4) that the defendant broke the contract, and (5) that the plaintiff suffered damage. *See* Pl.'s Resp. to the Revised Proposed Findings of Fact and Rulings of L. of the Def. (Docket No. 224) at 1-2 [hereinafter Pl.'s Response]. I now make the following additional findings of facts relevant to plaintiff's claim for breach of contract.

(1) Following initial discussions between Panagiotou and GTE representatives, a New Product Request ("NPR") form (Ex. 53) was issued in June 1979 within GTE for the production of reflectors for use in the Cool Light lights, comprising PAR 36 pyrex glass substrates to which was to be applied a hard dichroic coating for the production of "daylight" (on the order of 5600 K on the kelvin temperature scale by which light color is measured) from an incandescent "indoor light" lamp (on the order of 3250 K). *See* Ex. 53. This NPR constituted a performance specification and did not include any proprietary information, given the industry lighting standard.

(2) Sample coating work done by GTE for Cool Light in the fall of 1979 did not produce samples of the coated reflectors acceptable to Cool Light as Cool Light perceived its needs for its lights. By mid-December 1979, however, GTE began quoting prices per unit to Cool Light. Nevertheless, throughout the spring and summer of 1980, Panagiotou, Staubitz, and the GTE engineer performing the coating work, Charles Mellor, continued to try to work out problems of flaking and peeling and inadequate color quality.

(3) On September 25, 1980 Cool Light made its first purchase order for reflectors, the quantities of which by agreement of the parties were doubled. Cool Light ordered 2000 Par 36 reflectors, 1000 5600 K reflectors at $17.34/ea. and 1000 3200 K reflectors at $14.80/ea. This purchase order failed to describe the product that was the subject of the sale in a way mutually manifested as agreeable to the parties and also consistent with even the most modest of Cool Light's present claims. It could reasonably be inferred from the communications between the parties that GTE had manifested its commitment to making Par 36 reflectors meeting the performance characteristics of reflecting either "daylight" or "indoor light," at the kelvin temperatures specified. If Cool Light were content to make a claim based on that description of the product, perhaps a court could find that an enforceable contract existed. Proof of breach by GTE would be problematic, however, for reasons explained below. In any event Cool Light argues instead for a finding of a very different contract to deliver a product that would meet Cool Light's subjective standard of what would be satisfactory for its purpose — a standard whose criteria were never communicated, either in writing or orally. If there was a contract — a "meeting of the minds" through mutual manifestations — it was not a contract to make a product satisfactory to meet Cool Light's requirements, as subjectively perceived by Cool Light. No such agreement was ever made either in the written or in the oral communications between the parties.

(4) By November 19, 1980, GTE had prepared written specifications for coating 3250 K reflectors (Ex. 106), and by December 4, 1980, GTE had prepared similar specifications for coating 5600 K reflectors (Ex. 107). The written specifications stated the type of substrate (Par 36), the chemical coating (multilayer SiO_2 - TiO_2), equipment and methodology for testing the coated reflectors, transmission requirements, coat adhesion characteristics, color ("indoor": 3300 - 3600 K, with a red/blue measurement of 3150 - 3350 K and a green/

red measurement of at least 3200 K; "daylight": 5600 - 7000 K, with a red/blue measurement of 5200 - 6000 K and a green/red measurement of 5200 - 7500 K), and the uniformity required. These written specifications were once again performance specifications. They did not contain any indication of the number of layers of chemical coating (although the need for more than a few was implicit), nor the relative chemical concentrations of the two components of the chemical coating. There was no suggestion as to how the desired performance might be achieved. Cool Light has presented these two written specifications as proof that the parties had agreed on the product to be manufactured; i.e. that there had been a meeting of the minds and these specifications are a manifestation of that meeting. Cool Light bases this suggestion on an allegation it has adopted for the first time in its requests for subsidiary findings. I find that allegation, initially made by GTE's expert witness in the first trial, that a person skilled in the art of reflector technology could readily produce the desired reflector from these specifications, to be against the weight of the evidence. I find that GTE provided its best efforts to produce reflectors for Cool Light at least up until March 17, 1981, several months after these written specifications were drawn up. Nevertheless, GTE was unable to produce reflectors for Cool Light that satisfied Panagiotou's needs with sufficient consistency or in sufficient quantities. I find that there did not exist an agreement for a specific product because the purchase orders (a) did not adequately describe the unique product Cool Light sought to order, (b) did not incorporate any separate understanding of the parties, manifested in some way outside the purchase orders, as to what the reflectors would be, and (c) could not have incorporated any such separate understanding because no such mutual understanding existed at any time, and no such mutual understanding was ever manifested at any time in any form, oral or written.

(5) Subsequent purchase orders made in December 1980 (Ex. I), February 1981 (Ex. J), and January 1983 (Ex. K), as well as any other communications between the parties regarding the shipment of quantities of reflectors to Cool Light, likewise failed to establish a contract for the sale of goods defined in a way that would support any of Cool Light's claims in this case.

(6) GTE did deliver substantial quantities of coated reflectors to Cool Light. Few of the delivered reflectors were satisfactory to Cool Light for its purposes. Some subsets of the reflectors were substandard even under the performance specifications as described by GTE. The number of delivered reflectors falling into each of the categories "satisfactory," "unsatisfactory," and "substandard" was not developed in the evidence before the court. For that reason, the court could not in this state of the evidence make any reasonably particularized finding regarding the degree to which GTE failed, if it did fail, to live up to its own product description. Thus, the plaintiff has failed to meet its burden of proof on showing any quantum of damages even if a breach be assumed.

(7) At no time did Cool Light through Panagiotou or any other representative inform GTE or any of its representatives that Cool Light was also developing products for other markets, notably the medical or museum markets, and that Cool Light was dependent on GTE for the survival of its business in such other markets; nor did GTE come to be aware that Cool Light was developing alternate products for the Hollywood market, including DC power supply trucks, and 5K and 10K lamps. Panagiotou informed Kopelman that Cool Light would fail if GTE did not deliver adequate supplies of satisfactory reflectors; however, that warning came only at the end of the business relationship. I find that there was no manifested, mutual understanding between the parties at the time of the formation of any alleged contract that Cool Light's future depended on GTE. Although I find that GTE knew that Panagiotou hoped GTE would serve as Cool Light's

primary source of reflectors, I also find that GTE correctly believed that Panagiotou had other sources of supply.

(8) Even if it were found, contrary to my evaluation of the evidence, that the parties had formed a contract, any such contract between the parties, viewed most favorably to Cool Light, was limited to the purchase orders made; there was no manifested understanding between the parties that GTE would meet Cool Light's reflector requirements nor that GTE would continue to accept purchase orders into the indefinite future. At most, the parties each manifested hope, in the early stages of the business relationship between them, that it would prove long and profitable.

(9) Cool Light was unable to meet pre-existing obligations to GTE, and would have been unable to meet its contractual obligations to GTE within the time required if GTE had delivered promised quantities of reflectors that were acceptable to Cool Light. Although there is evidence that Cool Light had substantial assets in the form of letters of credit that would have enabled it to pay for the reflectors eventually, Cool Light would not have been entitled to the use of such assets until it could provide the completed light product. GTE was not required to deliver product for which it knew Cool Light could not pay within the time required under the terms of the purchase orders.

On the basis of these findings, I conclude that the relationship between the parties had not matured into an agreement of the kind that plaintiff claims, even as an alternative to its more sweeping primary claim in this case. Therefore, I conclude that I must enter judgment for GTE on plaintiff's claims for breach of contract.

I conclude also, as an independent basis for judgment for defendant, that even were I to assume the existence of an agreement such as plaintiff claims, Cool Light's claim for breach of contract fails because I find that Cool Light was not able to perform its own obligations in a timely manner. Its material breach by nonpayment of its current obliga-

tions, and its apparent inability to meet future payment obligations in a timely manner, relieved GTE of any obligation to deliver additional products according to a schedule fashioned before the Cool Light breach.

I also conclude that Cool Light has failed to prove its damages with sufficient specificity. On the basis of the evidence before me I cannot determine that the parties had agreed that Cool Light would be the exclusive judge of what was satisfactory product, nor can I determine what quantities of satisfactory and unsatisfactory reflectors were delivered by any other standard supported by evidence. I further conclude that any harm for which Cool Light would be entitled to compensation would be limited to that caused by a breach — if one could be found — of agreements memorialized in specific purchase orders placed by Cool Light. Cool Light would not be entitled to consequential damages for harm to any interests it may have had in the medical or museum lighting markets, nor to any damages for harm to Cool Light's prospective DC power supply truck or 5K and 10K lighting businesses because such damages were not a foreseeable consequence of the breach of the alleged agreements. *See Redgrave* v. *Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988) (en banc), *cert. denied*, 488 U.S. 1043 (1989). I make further findings and conclusions with respect to the appropriate measure of damages for any breach of contract below in Part VI.

IV. Breach of Implied Duty of Good Faith and Fair Dealing (Count XII)

The parties agree that in order to prevail on its claim for breach of the implied duty of good faith and fair dealing, Cool Light must establish: (1) that a contract existed, (2) that the defendant acted wrongfully and in bad faith, and (3) that the plaintiff was injured by the defendant's conduct. *See* Pl.'s Response at 9. I adopt as part of my findings and conclu-

sions relating to this count the findings and conclusions made in Part III, above. On the basis of those findings alone, judgment must be entered for defendant on count XII. In the interests of judicial economy, should any of the forgoing findings be questioned, I add further findings with regard to count XII.

(1) The parties entered into the relationship in the hope that Cool Light would become a substantial customer of GTE for coated reflectors. On paper, Cool Light became GTE's most substantial customer in a segment of GTE's business. Nonetheless, Cool Light's business was never real business since the product Cool Light hoped to order never existed as a product of GTE.

(2) On March 17, 1981, Bernard Kopelman, a senior executive at GTE in charge of new product operations at the coating facility, decided that GTE would cease accepting outside purchase orders and would concentrate its efforts on GTE's internal coating needs. Kopelman decided that GTE would fill existing purchase orders, but that outside customers would take second priority. Cool Light was not informed of this shift in policy at GTE until August 1981. I find that this delay would have been unreasonably long but for the fact that there was no contract between the parties of a kind that would give rise to a duty to inform about GTE's policy shift.

(3) In October 1981, Kopelman extracted a letter agreement from Panagiotou that exchanged GTE's promise of best efforts at performance of its obligations under existing purchase orders for Cool Light's promise to pay off its existing indebtedness and Cool Light's further promise not to pursue punitive action against GTE. I find no breach by GTE of its promise of best efforts. Also, Cool Light did not pay off its existing indebtedness.

V. Fraud (Count VI)

The parties agree that to prevail on its fraud count, Cool Light must prove that the defendant made a false represen-

tation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to its damage. *See* Pl.'s Response at 11. Cool Light asserts that GTE made the following false representations: first, Staubitz and Hidler told Panagiotou at their initial meeting at Logan Airport that GTE had the capacity to produce acceptable reflectors for Cool Light in production quantities; and second, Staubitz and Hidler told Panagiotou at their initial meeting at Logan Airport that they were opposed to the development of an HMI lamp at GTE but that they were going to attend a meeting with GTE salespeople to discuss the possibility of developing such a light source at GTE. With regard to these alleged incidents of fraud, I make the following findings and conclusions.

(1) Each of the statements was in fact made. The former statement, regarding the abilities of GTE, was made at an initial meeting between the parties before any attempt by GTE to produce any coated reflectors; as such, it constituted permissible puffing. Further, it was not known to be false when made, nor was it made recklessly. The second statement was true when made. Cool Light argues that the word "possible" connotes the absence of existing development efforts, but that in fact GTE began developing an HMI light source before the time the parties met. Panagiotou testified at the second trial, "From my first meeting with GTE, I was left under the impression that they would be manufacturing an HMI lamp . . . ." Transcript II-39 (afternoon session). In light of that testimony, I find that Panagiotou was made aware that GTE's production of an HMI lamp was already under consideration. Moreover, I find that at the time of the October 1978 meeting GTE's development of the HMI lamp had not proceeded very far in view of the fact that GTE first marketed an HMI lamp several years later. At the time the representation was made GTE's development efforts were incipient, and the eventual production of an HMI lamp could appropriately have been described as a mere "possibility."

(2) I also find that Cool Light suffered no harm as a result of the representation regarding GTE's HMI lamp. GTE did not contract with Cool Light not to make an HMI lamp. At the time of the meeting, GTE was already a competitor of Cool Light since it manufactured lamps for use in a competing Hollywood light, the FAY light. Also, Cool Light could not have suffered any injury as a result of GTE's competition unless GTE competed unfairly by denying Cool Light product to which Cool Light was entitled. Any measure of damages based on the fact that GTE denied Cool Light product to which it was entitled is precluded by my findings in Part III, above.

(3) Even if the representation made by Staubitz and Hidler regarding GTE's ability to make reflectors amounted to more than permissible puffing, Cool Light did not suffer any harm because of the statement. The statement was made at the parties' initial meeting in October of 1978. GTE failed to develop a satisfactory product for Panagiotou until at least June 1981. *See* Ex. 34. I infer that Panagiotou must have realized substantially earlier than June 1981, indeed at the latest by mid-1979, *see Exs.* 20-21, 23, that GTE did not have the capability to begin producing satisfactory reflectors in October 1978. In mid-1979, the relationship between GTE and Cool Light was less than one year old; the relationship continued compatibly for over two years after that point. If Cool Light had chosen to do so, it could have sought and found an alternate supplier of reflectors and worked with that source to achieve the skill level GTE finally achieved, within the time during which Cool Light had not yet received any shipments of reflectors from GTE on its purchase orders.

I find that GTE did not make any intentional or negligent misrepresentations. I further find that Cool Light did not suffer any harm as a result of the representations that GTE did make. See Part VI, *infra*, for further findings and conclusions regarding the appropriate measure of damages. I therefore conclude that judgment must be entered for defendant

on count VI. Since the trade secret counts are not before me, and plaintiff is not pressing any claim before me that GTE fraudulently induced Cool Light to provide GTE with Cool Light's proprietary information, I decline to make any further subsidiary findings regarding Cool Light trade secrets.

VI. Measure of Damages

Although my findings and conclusions in Parts II-V of this Opinion are sufficient to resolve all claims before me, I make the following additional findings that are dispositive on all counts. I make these additional findings in the interests of judicial economy, should any of the preceding findings be questioned.

Upon the court's inquiry early in the second trial as to whether plaintiff would be trying the case on an all-or-nothing basis, plaintiff's counsel responded that it was not his intention to do so. Nevertheless, only three models of damages were presented to the court, each model describing damages resulting from the total destruction of plaintiff's business. There is some contention between the parties as to whether Cool Light has in fact gone out of business. Although I do not deem it relevant to any of my conclusions, I find that Cool Light is a corporation still in existence. Nevertheless, Cool Light does not carry on significant business activities. I further find that a sister corporation of Cool Light that is doing significant business, Cool Lux Lighting Ind., Inc., is not a reincarnation of Cool Light.

For the reasons stated in Part III, above, I conclude that the first two damages models are wholly inappropriate. Plaintiff is not entitled to consequential damages resulting from the loss of business in the medical and museum lighting markets. Nor is plaintiff entitled to consequential damages resulting from the loss of any business other than that business that would have resulted from the fulfillment of GTE's alleged obligations (as delimited by the purchase orders). Under the

third model presented by plaintiff's expert, John McMullen, concerning the damages that plaintiff allegedly suffered solely as a result of GTE's failure to fill the purchase orders made, Cool Light claims to be entitled to damages of $6.1 million.

Plaintiff has not presented any alternate theories of partial damages, nor has plaintiff presented any basis upon which the court could award damages of less than $6.1 million. Thus, plaintiff's claim is, indeed, an all-or-nothing claim. I find that plaintiff must take nothing. For the reasons stated in Part II, above, plaintiff has failed to prove that defendant was the cause in fact of the harm alleged. Moreover, the failure of plaintiff's proof may readily be demonstrated in another way. I begin with the assumption that Cool Light's "value" under this third model was in fact $6.1 million dollars, all of which was lost.

(1) Given the "fact" that Cool Light's "value" was $6.1 million, prudent investors in 1981, taking into account the putative contracts with GTE (or relying on the representations made by GTE executives) would be expected to invest funds approaching within a reasonable percentage of this figure.

(2) When Cool Light was unable to obtain a large supply of satisfactory reflectors from GTE, it began selling off its inventory of lights to pay creditors. Cool Light's total liabilities in November 1981 were slightly more than one half of one million dollars. Ex. 97. If Cool Light were worth $6.1 million dollars at the time, it could have attracted sufficient capital investment to pay off its entire debt without selling its inventory. Moreover, Cool Light could have begun the process of developing another supplier of reflectors. I find that there were substantial alternate sources of supply. Indeed, the evidence suggests that a new facility could have been developed for a half million dollars. Panagiotou has testified that he did not believe that he had sufficient time to take such mitigating steps. That testimony is unpersuasive in view of plaintiff's duty to mitigate and in view of plaintiff's position in this case, one that I find to be supported by the weight

of the evidence, that the HMI light was not in a position to capture the market as it now has until at least sometime after 1981.

(3) If Cool Light were truly worth $6.1 million dollars and the demand for Cool Light lights were as claimed, then Cool Light failed to mitigate its damages. Rather than continuing to rent its lights to maintain a market presence and stimulate demand, Cool Light sold off its inventory and ceased doing business. Those actions were inconsistent with the "value" estimate made by plaintiff's expert. I cannot find that value estimate credible.

As a result, I find that if plaintiff suffered any harm at all, it was very far below the $6.1 million estimate and, having chosen the strategy of aiming higher, plaintiff has utterly failed to offer any evidence on the basis of which I could find any particular sum by a preponderance of the evidence. I find that the HMI did not become the dominant light source for Hollywood lighting until well after 1981 when flicker and ballast problems were resolved. Therefore, if Cool Light's contentions of "value" of the company were true, Cool Light had time during which it could have overcome its financial difficulties, found a producer of reflectors, and seized control of a substantial market share. If Cool Light truly believed that its future were so promising, then its decision to sell its lights rather than continuing to receive rental revenues was unreasonable. I find, in fact, from the powerful circumstantial evidence before me, that Cool Light's officers themselves, rather than unreasonably failing to capitalize on Cool Light's supposed value of such an order of magnitude, knew then that it had no such value and acted accordingly.

I reject plaintiff's expert's estimate of the amount of damages as wholly unsupportable on an alternate ground as well. McMullen's estimations of market shares and market growth amounted to pure speculation and cannot provide a basis for a reasoned damages estimate. I find that I must instead draw appropriate inferences from the market and its

reactions to Cool Light's rise and fall. The demand for the company's lights simply was not as great as Cool Light wishes it were. This finding, too, is supported by Cool Light's own decision to sell its inventory and cease doing business rather than to continue receiving rental revenues.

VI. Conclusion

For the reasons stated above, I conclude that counts VI, XI, and XII must be decided in favor of defendants. Having come to that conclusion, there is no need to address plaintiff's further contentions regarding problems of choice of law and punitive damages, and I decline to do so. Since defendant does not challenge my determination to enter judgment for plaintiff on the counterclaim, I do not address that claim in this Opinion. Final Judgment will be entered separately in accordance herewith.

Robert E. Keeton
United States District Judge

United States District Court
District of Massachusetts

CIVIL ACTION
NO. 86-2668-K

COOL LIGHT COMPANY, INC.,
PLAINTIFF,

v.

GTE PRODUCTS CORPORATION,
DEFENDANT.

FINAL JUDGMENT
December 11, 1991

This case was originally tried simultaneously before a jury on Counts I, IV, V, VI, XI, XII, and defendant's counterclaim, and before the court (McNaught, J.) on Counts III, VII, VIII, IX, and X. Count II was withdrawn before trial. On June 29, 1990, after full trial on all issues, the court (McNaught, J.) ordered judgment for the defendant on all counts of the Amended Complaint that had been tried to the court: Counts III, VII, VIII, IX, and X. By Order dated August 9, 1990, the court (McNaught, J.) ordered a new trial on all counts of the amended complaint that were originally tried to the jury: Counts I, IV, V, VI, XI, and XII, and defendant's counterclaim.

By Stipulation Regarding Retrial filed on September 13, 1991, the parties agreed that the following counts of the amended complaint would not be the subject of the retrial order, and were, therefore, waived: Counts I, II, III, IV, V, VII, VIII, and IX. Count X had previously been tried to the bench, and, therefore, was not subject to the retrial order.

Thus, in this procedural posture, this action came on for retrial before the court (Keeton, J.) only on Counts VI, XI, and XII, and the defendant's counterclaim. By its rulings, and based on its findings and conclusions, both stated orally at the conclusion of trial on October 31, 1991 and in an Opinion of this date, the court (Keeton, J.) ordered that judgment be entered for defendant on Counts VI, XI, and XII, and that judgment be entered for plaintiff on defendant's counterclaim.

All claims and counterclaims having thus been fully adjudicated, it is ORDERED:

(1) Plaintiff shall take nothing on all of the counts in the Amended Complaint and this action shall be and hereby is dismissed on the merits.

(2) Defendant shall take nothing on its counterclaim and the counterclaim shall be and hereby is dismissed on the merits.

(3) Each party shall bear its own costs.

ROBERT E. KEETON
United States District Judge

United States Court of Appeals
For the First Circuit

No. 90-1889

IN RE:
COOL LIGHT COMPANY, INC.,
PETITIONER.

Before
BREYER, *Chief Judge*,
CAMPBELL and TORRUELLA, *Circuit Judges*.

ORDER OF COURT

Entered: October 22, 1990

Before us is a petition for a writ of mandamus seeking review of the district court's August 9, 1990 order that a new trial be held in the case of *Cool Light Company, Inc.* v. *GTE Products Corp.*, No. 86-2668-Mc (D.Mass. 1990).

Cool Light has not demonstrated that it will suffer irreparable harm should the district court order stand, and has not proved a clear entitlement to the relief requested. *In re Recticel Foam Corp.*, 859 F.2d 1000, 1005 (1st Cir. 1988). Nor has Cool Light raised any issues of sufficient public concern to warrant the issuance of an extraordinary writ. *In re Bushkin Associates, Inc.*, 864 F.2d 241, 247 (1st Cir. 1989).

An order granting a new trial is interlocutory in nature and therefore not immediately appealable. A litigant is free to seek review of the propriety of such an order on direct appeal after final judgment has been entered, but such an order will rarely justify the issuance of a writ of mandamus. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34-36 (1980). We see

no extraordinary circumstances warranting a departure from this general rule. The petition for a writ of mandamus is denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

(cc. Messrs. Pittas, McCabe, van Gestel, Donelan)
Certified Copy to Judge McNaught, and District Court)

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts. The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. In so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent

with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may

be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

Supreme Court, U.S.
FILED
FEB 11 1993
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No. 92-1217

In the
Supreme Court of the United States

OCTOBER TERM, 1992

COOL LIGHT COMPANY, INC.,
Petitioner,

v.

GTE PRODUCTS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Introduction.

GTE Products Corporation ("Respondent")[1] files this brief pursuant to Rule 15 of the Rules of the Supreme Court of the

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[1] On January 29, 1993, Respondent was purchased by Osram GmbH and changed its name to Osram Sylvania, Inc. Pursuant to Rule 29:1 of the Rules of this Court,

United States in opposition to the petition for a writ of certiorari of petitioner Cool Light Company, Inc. ("Petitioner"). Though Respondent vigorously maintains that the First Circuit Court of Appeals' decision from which Petitioner seeks relief — a decision upholding the independent rulings of two respected district court judges — is correct, it will not here address the merits of that decision. Instead, Respondent asks this Court to deny the petition because the status and procedural posture of this case are such that resolution of the issues raised by Petitioner would not entitle it to any relief and would be irrelevant to the ultimate outcome of this action.

Statement of the Case.

The parties initially tried this action to a judge (McNaught, J.) and jury in the spring and early summer of 1990. Judge McNaught found in favor of Respondent on all five counts tried to the bench. Transcript, June 29, 1990 (Findings, McNaught, J.), A-39 through A-43; Final Judgment, December 11, 1991 (Keeton, J.), A-68 through A-69.[2] The jury returned a verdict in favor of Petitioner on three out of six counts brought by Petitioner and awarded it compensatory damages on each of the three counts and substantial punitive damages under Cali-

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respondent states as follows: Osram Sylvania, Inc. is a Delaware corporation which is a wholly-owned subsidiary of Osram GmbH, which is a wholly-owned subsidiary of Siemens A.G. Osram Sylvania, Inc. does not have any non-wholly owned subsidiaries. Prior to January 29, 1993, GTE Products Corporation was a wholly-owned subsidiary of GTE Products of Connecticut Corporation, a Connecticut corporation. GTE Products of Connecticut Corporation is a wholly-owned subsidiary of GTE Corporation, a New York corporation. For simplicity sake, Osram Sylvania, Inc. will be referred to herein as "GTE Products Corporation" or "Respondent."

[2] Exhibits identified as "A. " are attached to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit ("Petition") and not reprinted here. To avoid confusion, the page references to exhibits provided by Respondent are identified as "B. " and appended hereto.

fornia law. Jury Verdict Forms, A. 11 through A. 20. Respondent moved for judgment notwithstanding the verdict, and, in the alternative, for a new trial on the grounds, among others, that the verdict was against the clear weight of the evidence, that the jury made multiple awards for the same claimed injury, and that California law permitting punitive damages should not apply. Defendant GTE Products Corporation's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motions for New Trial and Remittitur, B. 1 through B. 2.

On August 9, 1990, Judge McNaught ordered a new trial on all counts tried to the jury, including those on which the verdicts went against the Petitioner. Memorandum and Order, August 9, 1990 (McNaught, J.), A. 21 through A. 24. Contrary to Petitioner's assertion, Petition at 6, and as noted by both the Court of Appeals and Judge Keeton (the district court judge who presided at the retrial), Judge McNaught's decision to grant a new trial was *not* based solely on concerns over the calculation and apportionment of compensatory damages, but was also driven by additional concerns about the verdicts. *Cool Light Company, Inc.* v. *GTE Products Corporation*, 973 F.2d 31 (1st Cir. 1992), A. 6 n.4 and A.9; Memorandum and Order, July 25, 1991 (Keeton, J.), at B. 6 ("Judge McNaught had numerous concerns about the jury verdict independent from the inconsistency issue"). In fact, Judge McNaught stated that he did not believe petitioner's two primary witnesses. *Cool Light Company, Inc.*, 973 F.2d 31, A.5 n.3 and A.8; Transcript, June 29, 1990 (Findings, McNaught, J.), A. 40 ("If there was a lack of good faith in this case . . . the lack of good faith was best characterized by Mr. Barkley [Petitioner's witness]. . . . I intimated the other day that I didn't believe Mr. Barkley, and I certainly did not. . . . I'm sorry, Mr. Panagiotou [Petitioner's principal], but I didn't believe you, either.").

Petitioner thereafter sought reconsideration from Judge McNaught of his new trial order, which was denied, Order,

August 29, 1990 (McNaught, J.), B. 8; mandamus from the Court of Appeals, which was denied, Order of Court, October 22, 1990 (First Circuit), B. 9 through B. 10; and, after Judge McNaught's retirement and reassignment of the case to Judge Keeton, reconsideration of the new trial order from Judge Keeton, which was denied, Memorandum and Order, July 25, 1991 (Keeton, J.), B. 3 through B. 7.

Next, Petitioner strategically chose to waive its right to a jury in the retrial, and to waive all but the three claims it had prevailed on before the jury. Opinion, December 11, 1991 (Findings, Keeton, J.), A. 50 through A. 67. At the close of the second trial, Judge Keeton ruled in favor of Respondent on all of Petitioner's claims, for several separate and independent reasons including: failure to prove causation of harm (*Id.* at A. 53 through A. 55), failure to prove breach of contract (*Id.* at A. 55 through A. 60), failure to prove breach of implied duty of good faith and fair dealing (*Id.* at A. 60 through A. 61), failure to prove fraud (*Id.* at A. 61 through A. 64), and failure to prove damages (*Id.* at A. 64 through A. 67).[3] Indeed, Judge Keeton noted that the lack of specificity of Petitioner's fraud claim was so acute that the claim would not have survived a motion to dismiss under Fed. R. Civ. P. 9(b). Transcript, October 31, 1991 (Findings, Keeton, J.), B. 3 through B. 7. Though having the opportunity to do so, Petitioner chose not to appeal Judge Keeton's findings and they are now the law of the case.

Petitioner appealed to the First Circuit on only two issues: (1) whether Judge McNaught acted properly in ordering a new trial; and (2) whether Judge McNaught acted properly in ruling against Petitioner on one of its bench-tried claims. *Cool Light Company, Inc.*, 973 F.2d 31, A. 4 through A. 5 n.4 and A. 5

[3] Contrary to Petitioner's assertion, the true bases for Judge Keeton's findings are not an "idiosyncratic" market theory, petition at 7-8 n.12, but the explicit, independent and cumulative findings referenced herein.

(text). The First Circuit affirmed, dismissing the latter contention in a footnote and upholding the new trial order, ruling:

> We are mindful of [Petitioner's] Seventh Amendment concerns in vacating a jury verdict. Yet there exists no violation of Seventh Amendment rights where a trial judge exercises his lawful discretion in awarding a new trial where speculation and confusion are manifest in not only the verdict but the evidentiary record itself.
>
> . . .
>
> [Petitioner] was given a second trial before a highly competent and fair-minded judge. His thorough analysis in finding plaintiff's failure of proof is totally justified by the record. We are convinced from our own review of the record that Judge McNaught's grant of a new trial was not a miscarriage of justice.

Id. at A. 10. The Court of Appeals subsequently denied Petitioner's motion for rehearing or rehearing *en banc*. Order of Court, October 15, 1993 (First Circuit), A. 30 through A. 31.[4]

Argument.

It Would Be Improvident to Grant Certiorari as Petitioner Is Not Entitled to Any Further or Different Relief Below Even If It Could Prevail on the Merits of Its Argument to This Court.

> While this Court decides questions of public importance, it decides them in the context of meaningful

[4] Petitioner recently filed a motion with the district court pursuant to Fed. R. Civ. P. 60 to overturn Judge McNaught's new-trial decision. As this motion is still pending, the instant certiorari petition may be untimely and may lead to multiple, successive petitions for certiorari.

> litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.

The Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). The Court has recognized that when the resolution of a legal issue is irrelevant to the ultimate outcome of the case, as it is here, certiorari should be denied. *See, e.g., New York* v. *Uplinger*, 467 U.S. 246 (1984) (writ of certiorari dismissed as improvidently granted where federal question not clearly framed and challenged decision based on other decision from which review not sought); *Belcher* v. *Stengel*, 429 U.S. 118 (1976) (writ of certiorari dismissed as improvidently granted where full briefing and oral argument demonstrated additional grounds supporting lower court decision beyond basis challenged in petition for certiorari); *National Labor Relations Board* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 491 n.16 (1960) (certiorari should be denied where litigation is not meaningful to the parties); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice, § 4.4, pages 201-202 (6th Ed. 1986) (citing *Somerville* v. *United States*, 376 U.S. 909 (1964), as case where certiorari denied because resolution of the conflict would not change result reached below). *Cf. Muskrat* v. *United States*, 219 U.S. 346 (1911) (Court will not issue advisory opinions).

The issue raised by Petitioner is the propriety of the granting of the motion for a new trial on those counts of a multi-count complaint which were tried to a jury. The new trial has been had — on terms and conditions dictated by Petitioner, including a waiver of jury at the second trial — and Petitioner lost. Opinion, December 11, 1991 (Findings, Keeton, J.), A. 50 through A. 67. Petitioner strategically chose not to appeal any of the findings or rulings made by Judge Keeton in the second trial. *See, Cool Light Company, Inc.*, 973 F.2d 31, A. 2 through A. 10.

A. *A Separate and Unchallenged Basis Exists Which Supports the Contested Decision.*

Petitioner is not entitled to any relief. Petitioner asserts in its petition that Judge McNaught's decision was based solely on verdict inconsistency and that his decision to order a new trial was pursuant to Rule 49 of the Federal Rules of Civil Procedure. Petition at 6. Petitioner then asks the Court to find that a new trial should not have been granted under Rule 49 and to reinstate the jury verdicts. Yet, Petitioner ignores the fact that the jury verdicts were against the clear weight of the evidence and revealed the jurors' total confusion, that this supported Judge McNaught's decision, and that both the First Circuit and Judge Keeton so found. *Cool Light Company, Inc.*, 973 F.2d 31, A. 6 n.4 ("[a]s Judge Keeton observed, however, Judge McNaught did not base his grant of a new trial solely on the inconsistency of the special interrogatories and the general verdict"), *id.* at A. 9 (noting *all* of Judge McNaught's reasons for ordering a new trial including concerns apart from the inconsistency issue); Memorandum and Order, July 25, 1991 (Keeton, J.), B. 3 through B. 7.

Therefore, even if Petitioner could prevail in demonstrating to this Court that the inconsistency of the jury verdicts did not require a new trial, it is not entitled to reinstatement of the jury verdicts as a separate and independent basis exists for the new trial order which has been confirmed by a second trial before a second judge. *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."); *Jackson* v. *Southern California Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989) (correct lower court decision may be affirmed on any grounds, and must be affirmed even if district court relied on wrong grounds or reasoning); *Klingman* v. *Levinson*, 877 F.2d 1357, 1360 n.3 (7th Cir.

1989) (reviewing court can affirm judgment on any ground which is supported by a factual basis for doing so in the record); *Knight* v. *Mills*, 836 F.2d 659, 661 (1st Cir. 1987) (appellate court should affirm correct decision of lower court even when lower court decision is based on inappropriate ground); *Railway Labor Executives' Ass'n* v. *Staten Island R. Corp.*, 792 F.2d 7, 12 (2d Cir. 1986) (appellate court may affirm lower court decision on any basis which finds sufficient factual support in the record), *cert. denied*, 479 U.S. 1054 (1987); *Hatch* v. *Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir.) (Court of Appeals may affirm lower court decision based on any grounds supported by the record), *cert. denied*, 474 U.S. 1021 (1985).

Judge McNaught's decision was confirmed by the results of the retrial in which Judge Keeton, who had before him virtually the entire transcript of testimony from the first trial and also heard live testimony, independently found that Petitioner's case was fatally flawed by numerous defects. *Cool Light Company, Inc.*, 973 F.2d 31, A. 10 (Judge Keeton's decision after the second trial in finding Petitioner's failure of proof is totally justified by the record); Transcript, October 31, 1991 (Findings, Keeton, J.), B. 11 through B. 21; Opinion, December 11, 1991 (Findings, Keeton, J.), A. 50 through A. 67. Judge Keeton's decision has not been appealed from and is now the law of the case. *See generally Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 815-816 (1988) (approving law of the case doctrine); *Lacy* v. *Gardino*, 791 F.2d 980, 984 (1st Cir.) (law of the case doctrine makes binding upon court a ruling by a court of the same or higher level made during prior stages of the same litigation), *cert. denied*, 479 U.S. 888 (1986); *Williamsburg Wax Museum, Inc.*, v. *Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987) (law of the case doctrine requires that legal decision made at one stage of litigation which is unchallenged in subsequent appeal when opportunity to do so existed becomes law

of the case for future stages of same litigation and parties are deemed to have waived right to challenge that decision at later time); *Laffey* v. *Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-1090 and 1102-1103 (D.C. Cir. 1984) (unappealed lower court decisions are law of the case in proceedings after remand), *cert. denied*, 469 U.S. 1181 (1985); *Munoz* v. *Imperial County*, 667 F.2d 811, 817 (9th Cir.) (same), *cert. denied*, 459 U.S. 825 (1982); *Fogel* v. *Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) ("It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost."), *cert. denied*, 459 U.S. 828 (1982); J. Moore, J. Lucas & T. Currier, 1B Moore's Federal Practice, § 0.404[1] and [4.-3] (1992). In short, Judge Keeton's decision that Petitioner has no case, unappealed by Petitioner and respected by the Court of Appeals, would be binding were this case remanded.

B. *The Court Should Not Reinstate the Jury Verdicts Because Either: (a) the Lower Courts Have Found that the Jury Verdicts are Against the Clear Weight of the Evidence and Demonstrate Juror Confusion; or (b) Respondent is Entitled to But Has Not Yet Received a Ruling By the Trial Court on Its Motion to Set Aside the Jury Verdicts As Against the Clear Weight of the Evidence.*

Petitioner seeks to avoid the fact that the new trial order is supported by the clear weight of the evidence by arguing that Judge McNaught's decision was not related to Respondent's then-pending motion for a new trial based on the weight of the evidence, but solely on Judge McNaught's concerns, raised *sua sponte*, about inconsistencies in the jury verdicts. Indeed, Petitioner argues that Judge McNaught never acted on Respondent's motion. Petition at 6 ("apart from his concern over the calculation and apportionment of compensatory damages,

Judge McNaught *never ruled on any other ground* [when ordering the new trial]") (emphasis supplied). Petitioner's argument proves too much.[5]

Clearly, Respondent is entitled to have a ruling on its motion for a new trial at some point. Fed. R. Civ. P. 50 and 59. The only one who could make such a determination is the judge who presided over the trial and was thereby able to observe the demeanor and testimony of live witnesses: Judge McNaught. *See Marshall* v. *Lonberger*, 459 U.S. 422, 434 (1983) (reviewing courts not in a position "to redetermine credibility of witnesses whose demeanor has been observed by the [] trial court."); *United States* v. *Oregon Medical Society*, 343 U.S. 326, 339 (1952) (" 'Face to face with living witnesses [the trial judge] holds a position of advantage from which appellate judges are excluded. . . . [T]he exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' ") (citation omitted). As Judge McNaught is now retired, this case cannot be remanded to him for a further determination as to whether or not the jury verdicts were against the clear weight of the evidence.

The only practical way of protecting Respondent's right to move for a new trial would be to conduct a second trial to determine whether Petitioner's claims are valid. In this case, the second trial has already occurred and Judge Keeton has ruled that, for numerous reasons, Petitioner cannot prevail on its claims. As noted above, Petitioner did not appeal Judge

[5] Respondent believes Judge McNaught, who openly stated his finding that Petitioner's two key witnesses were unbelievable and ruled against Petitioner on all bench-tried claims, has already determined that the jury verdicts were against the clear weight of the evidence. However, for the purposes of this section B only, Respondent will accept Petitioner's contrary assertion.

Keeton's findings that it has no case and such findings are now the law of the case. A *third* trial would be futile as the law of the case doctrine would prevent recovery by Petitioner. *See Williamsburg Wax Museum*, 810 F.2d at 250 (trial court decision which is unchallenged in subsequent appeal when opportunity to do so existed becomes law of the case, binding in subsequent stages of same action); *Laffey*, 740 F.2d at 1089-1090 and 1102-1103 (same); *Munoz*, 667 F.2d at 817 (same); *Fogel*, 668 F.2d at 109 (same). Therefore, Petitioner is entitled to no further relief from this Court. Further, Respondent has a right to have addressed its contention that punitive damages under California law cannot be awarded as California law does not apply.

In short, Petitioner is hoist on its own petard: either the decision to order a new trial from which Petitioner seeks relief is supported by the independent, unchallenged basis that the verdicts were against the clear weight of the evidence, or Respondent's motion for a new trial is still pending and, due to the peculiar posture of this case, can only be resolved by a second trial. Since that second trial has already occurred, and Petitioner did not appeal from its judgment, this case is over.

C. *The Court Should Not Reinstate Demonstrably Erroneous Jury Verdicts.*

Finally, in the guise of adjusting differences among circuits, it would be fundamentally unjust to reinstate jury verdicts which two federal judges have independently found to be demonstrably wrong. *See Cool Light Company, Inc.*, 973 F.2d 31, A. 2 through A. 10; ("[Judge Keeton's] thorough analysis in finding [Petitioner's] failure of proof is totally justified by the record"]; Transcript, October 31, 1991 (Findings, Keeton, J.), B. 11 through B. 21; Opinion, December 11, 1991 (Findings, Keeton, J.), A. 50 through A. 67; Transcript, June 29,

1990 (Findings, McNaught, J.), A. 39 through A. 43; Memorandum and Order, August 9, 1990 (McNaught, J.), A. 21 through A. 24.

Conclusion.

It would be improvident to grant a writ of certiorari in a case, such as this, in which no further relief can be granted to the Petitioner because it has already received all the relief available. The petition should be denied.

Respectfully submitted,

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B.1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COOL LIGHT COMPANY, INC.,
Plaintiff,

v.

CIVIL ACTION
No. 86-2669-MC

GTE PRODUCTS CORPORATION,
Defendant.

July 26, 1990

DEFENDANT GTE PRODUCTS CORPORATION'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTIONS FOR NEW TRIAL AND REMITTITUR

Defendant GTE Products Corporation ("GTE") respectfully moves this Court, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, to have the vedict and any judgment entered thereon set aside and to enter judgment in its favor. Judgment notwithstanding the verdict should be entered in favor of GTE because: (1) plaintiff Cool Light Company, Inc. ("Cool Light") failed to introduce sufficient evidence to submit the fraud claim to the jury; (2) Cool Light's claim of punitive damages should not have been submitted to the jury since Massachusetts and not California law governs this action; and, (3) there was insufficient evidence to submit the claims of breach of contract and breach of implied covenant of good faith and fair dealing to the jury.

In the alternative, GTE moves this Court, pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure, to vacate

any judgment entered upon the verdict and grant a new trial for the reasons that the verdict was against the clear weight of the evidence, the verdict was excessive, the jury returned multiple awards for the same claimed injury, and the Court erred in refusing to give certain instructions requested by GTE with respect to damages. Further, in the event that this Court allows the verdict to stand, GTE moves this Court, pursuant to Rule 50(b), to order a remittitur.

GTE submits a memorandum of law in support of these motions.

Respectfully submitted,

DEFENDANT,

GTE PRODUCTS CORPORATION,

_____

Charles Donelan (BBO #129340)
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CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served by hand upon the following:

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Date: _____

_____
Ann L. Palmieri

B.3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COOL LIGHT COMPANY, INC.,
Plaintiff,

v.

GTE PRODUCTS CORPORATION,
Defendant.

CIVIL ACTION
No. 86-2668-K

Memorandum and Order
July 25, 1991

Now before the court is Plaintiff's Renewed Motion for Reconsideration (Docket No. 175, filed May 15, 1991) along with a supporting memorandum (Docket No. 176, filed May 15, 1991) and defendants opposition (Docket No. 177, filed May 29, 1991).

I.

This case was originally tried before Judge McNaught and a jury in June 1990. After the trial, Judge McNaught was troubled by many aspects of the jury's verdict, including the possibility that multiple damages were awarded for the same injury and the further possibility that there was an inconsistency between the jury's general verdict in favor of plaintiff on three counts of plaintiff's complaint and its response to a special interrogatory. As a result of his concerns, Judge McNaught ordered a new trial on all counts that had been tried to the jury. This case was randomly reassigned upon Judge

McNaught's retirement, and it has been set for retrial on October 15, 1991.

After reviewing the submissions and the record relating to Judge McNaught's issuance of the new trial order, I conclude that plaintiff has not made a sufficient showing that Judge McNaught abused his discretion in ordering a new trial. Thus, I will not vacate the order for new trial, and plaintiff's motion for reconsideration will be denied.

II.

The facts underlying plaintiff's motion for reconsideration are not in dispute. After the presentation of evidence at trial, the jury returned a general verdict in favor of plaintiff on Count VI (fraud), Count XI (contract) and Count XII (violation of duty of good faith) in which it assessed compensatory damages against defendant of $2,950,000 on Count VI, $3,694,00 on Count XI and $2,800,000 on Count XII. The jury awarded plaintiff a total of $9,450,000 on Count VI, but in response to an oral special interrogatory, the jury stated that $6,500,000 of that figure was an award of punitive damages under California law. Thus, the jury awarded plaintiff a total of $15,944,000 in damages on Counts VI, XI and XII, $9,444,000 of which was an award of compensatory damages.

On August 2, 1990, a post-trial conference was held for the purpose of moving toward entry of final judgment. At the conference, Judge McNaught expressed concern that the jury's $9,444,000 award of compensatory damages on its general verdict did not square with its answer to special interrogatory number 14 in which it stated that plaintiff had suffered a total of $9,300,000 in lost profits as a result of defendant's conduct. Plaintiff argued that the $144,000 discrepancy between the total amount of compensatory damages awarded by the jury and its calculation of total lost profits represented additional

compensatory damages, other than lost profits, awarded by the jury on Count XI (the contract claim). Judge McNaught also stated at the August 2, 1990 conference that he was concerned that the jury might have awarded multiple damages for the same harm, and that he had difficulty understanding how the jury could have awarded different damage amounts for Counts VI, XI, and XII for what he viewed to be essentially the same harm.

At the August 2, 1990 conference, Judge McNaught also heard argument on defendant's motion for judgment notwithstanding the verdict and, in the alternative, for a new trial (Docket No. 157, filed July 26, 1991). The stated grounds for the motion for judgment notwithstanding the verdict were that there was insufficient evidence to support the jury verdict and that the punitive damages awarded was not permitted under Massachusetts law, the law that defendant contends governs the case. The grounds for the alternative motion for new trial were: (1) that the court omitted a necessary instruction regarding damages; (2) that the verdict was against the clear weight of the evidence; (3) that the damages awarded were excessive; and (4) that plaintiff was awarded multiple damages for the same injury. Defendant never asserted, either at trial or in the motion for judgment notwithstanding the verdict and for a new trial, that there was an inconsistency between the general verdict and the jury's response to special interrogatory number 14.

On August 9, 1990, Judge McNaught issued a Memorandum and Order in which he ordered a new trial on all counts tried to the jury. The Memorandum and Order does not explicitly state the specific ground for the order of new trial, but it is evident that Judge McNaught was troubled by numerous aspects of the jury verdict:

> I considered granting judgment *non obstante veredicto* on one or more of the counts of the complaint

> which were given to the jury for determination, and decided against it, since, if a new trial is granted, new evidence might be offered. There is also the fact that even if I act in that fashion, we are still left to speculate concerning the award of damages, the source of the amounts decided upon by the jury, and the possibilities that the jury came up with inconsistent amounts, or amounts that were divided among the counts improperly.
>
> In sum, one must speculate in order to assess the work of the jury.

August 9, 1990 Memorandum and Order at pp. 4-5.

III.

Both parties have focused in their memoranda solely on Judge McNaught's consideration of the issue of the inconsistency between the general verdict and special interrogatory number 14 in making their arguments with respect to the propriety of the order for new trial. However, my review of the August 9, 1990 Memorandum and Order reveals that this focus is misplaced; Judge McNaught had numerous concerns about the jury verdict independent from the inconsistency issue. Thus, even if I assume that there was an inconsistency between the general verdict and the jury's response to special interrogatory number 14, and if I further assume that Judge McNaught would have been procedurally precluded from ordering a new trial based solely on the foregoing inconsistency because defendant failed to object to the inconsistency before the discharge of the jury, *see Fernandez* v. *Chardon*, 681 F.2d 42, 58 (1st Cir. 1982), *aff'd on other grounds sub nom.*, *Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983) ("objections to the inconsistency of verdicts must be made before the jury is dis-

charged or by motion to resubmit to the jury"), I nevertheless conclude that the order for new trial should not be vacated. Plaintiff has made no showing that Judge McNaught abused his discretion by ordering a new trial in light of his concerns about the verdict apart from the inconsistency issue. *See MacQuarrie* v. *Howard Johnson Company*, 877 F.2d 126, 131 (1st Cir. 1989) ("trial courts have wide discretion when considering a motion for a new trial"). In the absence of any showing that Judge McNaught's order for new trial was a clearly erroneous exercise of his discretion — taking into consideration *all* of his expressed reasons for ordering the new trial — the order for new trial will not be vacated, and plaintiff's motion for reconsideration will be denied. *See Lacy* v. *Gardino*, 791 F.2d 980, 985 (1st Cir.), *cert. denied*, 479 U.S. 888 (1986) (law of the case doctrine ordinarily prevents reconsideration of an earlier ruling in a case unless that ruling is clearly erroneous).

ORDER

For the foregoing reasons, it is ORDERED:

Plaintiff's Renewed Motion for Reconsideration (Docket No. 175) is denied.

_____

United States District Judge

B.8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COOL LIGHT COMPANY, INC.,
Plaintiff,

v.

GTE PRODUCTS CORPORATION,
Defendant.

Civil Action No. 86-2668-Mc

BBO #327040
BBO #552245
BBO #400780

PLAINTIFF'S MOTION FOR RECONSIDERATION
OR, IN THE ALTERNATIVE, FOR REDUCTION
IN AMOUNT OF COMPENSATORY DAMAGES

Plaintiff, Cool Light Company, Inc. ("Cool Light"), hereby moves for reconsideration of this Court's Memorandum and Order on Proposed Orders of Judgment and on Motion for Judgment N.O.V. dated August 9, 1990. In support of its Motion, Cool Light relies on the unanimous jury verdict of June 29, 1990, the jury's answers to specific Interrogatories propounded by the Court and the accompanying statement of points and authorities.

Edwin A. McCabe
Suzanne E. MacPherson
McCABE & ASSOCIATES
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One Federal Street
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DATED: August 20, 1990

Civil Action 29, 1990 Denied. Mr Nayler, DJ

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1889

IN RE:

COOL LIGHT COMPANY, INC.,
Petitioner,

Before

Breyer, *Chief Judge*,
Campbell and Torruella, *Circuit Judges*.

ORDER OF COURT
Entered October 22, 1990

Before us is a petition for writ of mandamus seeking review of the district court's August 9, 1990 order that a new trial be held in the case of *Cool Light Company, Inc.* v. *GTE Products Corp.*, No. 86-2668-Mc (D.Mass. 1990).

Cool Light has not demonstrated that it will suffer irreparable harm should the district court order stand, and has not proved a clear entitlement to the relief requested. *In re Recticel Foam Corp.*, 859 F.2d 1000, 1005 (1st Cir. 1988). Nor has Cool Light raised any issues of sufficient public concern to warrant the issuance of an extraordinary writ. *In re Bushkin Associates, Inc.*, 864 F.2d 241, 247 (1st Cir. 1989).

An order granting a new trial is interlocutory in nature and therefore not immediately appealable. A litigant is free to seek

review of the propriety of such an order on direct appeal after final judgment has been entered, but such an order will rarely justify the issuance of a writ of mandamus. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34-36 (1980). We see no extraordinary circumstances warranting a departure from this general rule. The petition for writ of mandamus is denied.

By the Court:

Francis P. Scigliano, Clerk.

(cc: Messrs. Pittas, McCabe, van Gestel, Donelan)
(Certified Copy to Judge McNaught, and District Court)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COOL LIGHT COMPANY, INC.,

vs.

GTE PRODUCTS CORPORATION

CIVIL ACTION
No. 86-2668-K

Courtroom 11
Thursday, October 31, 1991
Boston, Massachusetts

NON-JURY TRIAL PROCEEDINGS
DAY 5

BEFORE THE HONORABLE ROBERT E. KEETON
UNITED STATES DISTRICT JUDGE

For the Plaintiff:
THE McCABE GROUP
By: Edwin A. McCabe, Esquire
Joseph P. Davis, III, Esquire
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For the Defendant:
GOODWIN, PROCTER & HOAR
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Official Court Reporter
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1201 USPO & Courthouse
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[V-64] one 31-A.

MR. DAVIS: Okay. And that's the end of the scrivener's list.

Oh, I'm sorry. Also, there were a couple of documents the last time we were together that were entered into evidence; however, we didn't have copies for them to be numbered, so I think with the clerk we can get those numbered. Those are the Hoppert and Hammer exhibits that were entered.

THE COURT: Now, we reserved numbers at the end. Is this the same document —

MR. DAVIS: Those are the ones that we reserved numbers on. I didn't realize they'd been reserved.

THE COURT: Yes, that had been done.

MR. DAVIS: So we have copies of those.

THE COURT: All right. Thank you.

All right. Now, I have some settled views about findings I must make on the evidence in this case on critical issues that are decisive and I will state those findings now and explain them briefly. As I say, I think they are dispositive. I will confer with you after I have stated these findings about whether you wish me to file additional subsidiary findings. I have settled views on a lot of the subsidiary findings as well that I will not state this morning but that are entirely consistent with the **[V-65]** findings that I will state, but I think in order to expedite the disposition of this matter it is sensible for me to state some findings and conclusions which are in my view sufficient under the law to be dispositive of the case. The findings that I will state I will put first in a very general form.

There are two independent reasons as to each of the three claims that are before me in this trial: that is, the fraud claim in Count 6, the contract claim in Count 11, and the breach of the obligation of good faith claim in Count 12. There are two independent reasons that are decisive of each of those claims. The first of those reasons has to do with the requirements of

particularity and specificity not only of the statement of the claim but of the proof to support the claim. The second of those findings has to do with causation requirements, and in this respect I'm not talking about, quote, legal cause, unquote, in some unsophisticated sense that goes beyond the requirements of cause and fact, with quotes around it, as we use that term in law. I'm talking about cause and fact requirements. Now, that means that I must deny each of the claims of the plaintiff in this case for each of these independent reasons. Now let me turn first to the fraud claim and the first of these reasons, the particularity or specificity requirement.

[V-66] In a fraud claim we commonly think of it as involving either four or eight elements, depending on which way you want to state it. If we state it as four, false representation, which of course you can break down into two and thus turn it into eight — one, false representation; two, intent to deceive, which involves an element of scienter and an intent that the representation be relief upon. I'll come back to that one in a moment because there is a qualification of that one that I want to state with respect to this case. Three, detrimental reliance, and four, causing harm.

Now, the particularity requirement goes to the first of those: that is, the false representation, and I'm going to explain in a moment why I think the particularity requirements have not been met either by the claim or by the proof in this case. But before I do that I want to just explain that although the case has been argued to me to a considerable extent by defense counsel on the theory that an intent to deceive is required, I am not resting my decision on that basis. There is a substantial body of law with respect to liability for negligent misrepresentation, which means there is not an intent to deceive requirement, but instead some kind of fault requirement short of intent. And one of the issues I had in mind in saying to you earlier that I needed to have you address the law that sets the

[V-67] standards of liability and the measure of damages here is that the measure of damages may be somewhat different depending on whether we're using a negligent misrepresentation or an intentional misrepresentation standard. But I don't find it necessary to go into those issues, fortunately, in this instance, because the overriding finding that I think I must make on the evidence in this case as fact finder with respect to the false representation requirement moots the other issue with respect to what is the requirement with respect to the standard of fault for knowledge or whether one should at least have known of the false representation.

Now I come back, then, to explaining the specificity and particularity requirement as I think I must apply it here. I've been troubled, as I have explained before, all along by the lack of specificity of the claim of fraud in the documents that came to me for consideration before the trial evidence was presented here. The closest the plaintiff has come to identifying precisely an alleged false representation is phrased in approximately this way, and I'm not exactly quoting: That GTE had represented that it had the capacity to coat reflectors in production quantities with consistent quality in yields. Now, that does not meet the requirements of particularity and specificity, and these requirements are not merely pleadings **[V-68]** requirements but proof requirements as well.

It is true that we have in the Federal Rules of Civil Procedure in Rule 9(b) a pleading requirement, and the wisdom of having such a requirement is demonstrated, I think, by the history of this case. If that requirement had been invoked by the defendant in this case at an early stage, we might have saved all of the parties a lot of litigation costs in a futile exercise, because if no greater specificity than what has been offered to me here at the end of the trial had been offered, the appropriate ruling would have been that doesn't state a claim of fraud. But of course it is not the pleadings requirement I am applying here.

That requirement has been waived by the defendant by not having been asserted in the early stages. So I accept the proposition that if you can at the end of the trial, after all the evidence is before me and through oral argument, formulate for me a proposed finding that I could make on the evidence as to what was the false representation and formulate it in a way that it would meet the requirements of the law as to what is required, then I would accept that and make that finding.

But one thing that really has not been addressed in the submissions before me here is that the law makes a clear distinction between what we call false representation — and we ordinarily mean in that respect **[V-69]** representation of fact — false representation of fact, and I think we might take this alleged representation of capacity as a representation of fact. The law requires a false representation of fact and clearly distinguishes between a false representation of fact and what we commonly refer to in the commercial context as permissible puffing. That's the reason we have the requirement of specificity and particularity, to help us draw that line.

Now, let me return to this proposed specification, the closest it has come in the course of this entire trial, GTE had the capacity to coat reflectors in production quantities with consistent quality in yields. Consistent quality, to have meaning that I can accept and apply or that any other fact finder could accept and apply as a measure of judgment, has to mean — has to identify for me what is that quality. Just consistency doesn't help us. Obviously, it was more than just being consistent. It was to be a quality that would serve some purpose that was of interest to the parties. That quality has not been defined. There is no evidence before me, no oral testimony, no written testimony, no testimony from which I could draw an inference as to what communications occurred that defined that quality. Instead, the evidence before me demonstrates quite clearly that what was going on between the parties was negotiations looking to coming to some understanding of what **[V-70]** that would be.

The closest to a specification here is a specification in terms of the performance, the way it would work, the delivery of the light that it would affect with the transmission of the heat. There was, I think one might say, an understanding between the parties as to what they were aiming for in that respect, but there is no way I can interpret the evidence that is before me as a representation by GTE that: "We will guarantee that it will function in that way." There is no evidence before me that I can interpret it as a representation by GTE that: "We now know that we now have the capacity to do that." Instead, the evidence before me is that there was a period of negotiation and efforts through trial runs and inspections and tests and returns aiming for that process. Plaintiff has argued to me that the false representation was made back at the beginning before that whole process started. There's no way I as fact finder can fairly and reasonably interpret the evidence before me as to the communications as a representation back there before this process of interaction between them started as a warranty, as a representation of fact. "We have that capacity now." Even at this late stage with all the evidence before me, I still do not have a basis for making a finding as to some standard of quality that I would be able to apply in order to determine whether it had been met in **[V-71]** this case.

Now, let me pause at this point to say that that problem of lack of specificity I see also as a problem in two other respects in this case, a problem with respect to the contract claim, both the contract and the good faith claim by the plaintiff, and a problem with respect to the counterclaim. I'll come back to that latter one later. Let me turn now briefly to the application of that requirement of specificity to the contract itself.

We speak of a contract as a, quote, meeting of the minds, unquote. Of course, that's metaphorical, because we're talking about the manifested intent of the parties. We're not talking about what's in their minds unexpressed. We're talking about what they express to each other about what is in their minds.

I am not able to find for the plaintiff on the contract claim for one reason because I am not able to find that the parties had come to a manifested meeting of the minds with respect to this product, with respect to the quality of this product in the sense of its characteristics rather than in the sense of what they were aiming for. And they have not come to a contractual agreement that has settled all of the terms when they have only come to an agreement to move forward with certain relationships between them looking toward the hope on both sides that they would **[V-72]** come to the point that they would have a meeting of minds about the quality in the sense of the characteristics of this product and how it could be made as distinguished from the performance criteria that they were both aiming for in the end. So the lack of specificity and particularity is a fatal flaw in the contract claim as well as the fraud claim, and of course the same thing applies to the good faith claim.

Now let me turn to the completely independent basis for decision. Of course, the findings that I have just made, if they're sustained on appeal, are decisive against the plaintiff's claim by themselves, but there is a second reason that I now turn to that also is independently decisive against each of these claims, and that is the causation question.

As I spoke at first of the various elements of any fraud claim in any jurisdiction — and there's no real choice of law problem here, because this is true in each of the states whose law might be proposed to me for application here — as I spoke of these, I spoke of the last of the four elements, or the seventh and eighth if you want to put it that way, causing harm.

Now, on the causation isue in this case, I am aware that I have before me a lot of quite conflicting evidence with respect to the characteristics and the **[V-73]** performance of Cool Lights compared with various other products that might compete with it in the marketplace; the FAY lights, the HMI, anything else that might come into the marketplace. And counsel spoke in

the course of the argument about wondering about the Court's expertise in sitting here and evaluating how the different products would work in the marketplace. Well, I share that concern, and so the overwhelming evidence for me is not the testimony of the witnesses on one side or the other with respect to this conflict about what are the characteristics of this product in comparison with others that will be competing with it in the marketplace, but what does the marketplace tell us, what does the marketplace tell us.

The most overwhelming evidence before me is the evidence, partly direct but more the circumstantial evidence, that here we are in 1991. I'm being asked to find that the characteristics of the Cool Lights are such that but for the absence of the production by GTE of lights that met the expectations they were aiming for, both parties were aiming for, but for that, Cool Light would now have a major percent of the market and would have had a major percent of the market in the meanwhile. Now, I cannot find that contention credible. There are a number of different ways of looking at it.

The ultimate way of looking at it is the market **[V-74]** tells me otherwise, because Cool Lights do not have a significant position in the market at this moment. And if they were valued by the decision makers in the market as the plaintiff asks me to value them here after hearing evidence about characteristics and so forth, if they were valued by decision makers in the market in that same way that I am being asked to say they are valued, they would have a place in the market today, if not Cool Lights themselves, another product very much like them, because of course if it can be developed by one group, it can be developed by another group. And so if they were as good as McMullen's premises assumed, the marketplace would look different today. Because of the evidence before me as to what the marketplace does show, that is the most probative, the weightiest evidence that I as fact finder credit in determining

as a fact. That even if I assume that the particularity and specificity requirements were satisfied, I still must decide for the defendant on each of the plaintiff's claims because of the requirement of showing that the false representation or the breach of contract or the branch of the obligation of good faith was a cause of the harm that is being alleged. I cannot make that finding. The marketplace tells me otherwise.

Now, I have of course in thinking about these claims considered not only the claim for the total amount, **[V-75]** the valuation of the business at over $40 million as of the time of the alleged breach, but also about the lesser claims for which there have been alleged to be bases here, but I cannot make the causation finding for the plaintiff even as to those lesser claims. One of the subsidiary matters that stands in the way of that is the evidence before me that there was in existence and in Cool Light's possession a quantity of products that functioned as Cool Lights and even that quantity, rather than entering and serving in that most effective part of the marketplace in the evidence before me, the rental market, was not used in that way. I don't draw inferences from that that it was a management problem, that it was a resource problem. I draw inferences from that more weightily that it was a market problem of the competition out there in the marketplace and the market itself, of the people who are the pragmatic users and judges of the qualities of this and all of the competing products expressing their views collectively through the market so that Cool Light could not even capture that part of the market that might have been available to them in the short window of time before competitive products became more effective in the competition of the marketplace.

Now, those are brief explanations of the overriding ultimate fact findings that make it necessary for me to decide the claims against the plaintiff. You've asked **[V-76]** me for a great number of subsidiary findings on details. I'm not sure it's useful

to do that, but I'll come back in a moment to confer with you about whether the parties wish to request me to do that, which I would not do today but instead do by further findings in writing.

I come finally to speak of the counterclaim. I find that there were returns of product for which a part at least of the counterclaim is made and that GTE at least acquiesced in those returns. And borrowing the phrase from counsel's argument which caught my attention at the time, I have not been able to find in the evidence before me hard evidence as to how I could calculate what if any somewhat smaller counterclaim is supported by the evidence before me. And there are circumstances in which the reasonable certainty of damages requirement may be satisfied by a court or a jury making a finding that there is reasonable certainty at least up to this level even though there might have been some greater damage unspecified and cannot be quantified in the way necessary. As I've tried to do that in this case as I've thought about it and wondered if I might get some help in doing it in the arguments today, I haven't been able to identify the hard evidence from which I could draw a reasoned inference.

Now, you see, it is not appropriate for — this is not a thing like pain and suffering that we put to the **[V-77]** jury without reasoned measure. This is a matter on which a fact finding by a court or jury is supposed to be a reasoned finding, reasoned from evidence, and I am not able to make that finding. And so I think it's simply the question of the burden of proof, that having found that the parties were working towards something they had not yet achieved as to specificity of what the product would be and how it would be made that there was a process of billing and returns and credits, I am not able to calculate a measure of damages, if any. I am not even able to say with assurance that I can find that the quality of what was delivered and not returned and not rejected would support some dollar

figure for a counterclaim. So, for that reason it's my view that I should also decide that the counterclaim is not proved.

Now, those are the findings that I will state today. We need to confer about how we proceed to ultimate disposition of the case, the form of judgment. I suspect that we may need not simply to have a judgment entered that recites all claims of the plaintiffs are denied and all counterclaims by the defendants are denied. You may want something more than that in this final judgment. It must be a recitation of disposition of all of the claims and counterclaims in order to be a final judgment. We don't want to turn into the problem of entering something here that the Court of Appeals then tells us we've got to enter **[V-78]** another order, and of course it has to be entered separately.

What do you wish to do? Do you wish to confer about the form of final judgment and either submit it to me jointly if you can or submit your respective proposals, or do you want to set another conference date to confer about it?

MR. MCCABE: I would think that particularly if we can do so soon to set another date would make sense. Certainly, Mr. van Gestel and I will talk about the form of judgment to be entered, but there is also this issue of further subsidiary findings and so forth. We don't want to be in a position of asking the Court to do things that would be unnecessary. By the same token, obviously, we have one or two reactions to what we just heard. So, I think if we could perhaps have a short conference sometime in the near future, that would be useful.

THE COURT: All right. Excuse me for a moment. I think I'll get the calendar.

[PAUSE.]

THE COURT: Let me suggest 3:30 on Tuesdasy, November 12.

MR. MCCABE: That's acceptable. That's fine, your Honor.

MR. VAN GESTEL: Yes.